LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG. 2 1966
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 407

RALPH NEELY,

Petitioner,

v.

HOUSTON OILERS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANGUS G. WYNNE,
2808 Southland Center,
Dallas, Texas 75201,

JAMES D. FELLERS,
J. HOWARD EDMONDSON,
2700 First National Bldg.,
Oklahoma City,
Oklahoma 73102,
Counsel for Petitioner.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—MI 1-3130

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Facts	5
Reasons for Granting the Writ	8
Conclusion	19
Appendix A—Statute	A-1
B—Finding of Fact, Conclusions of Law and Judgment of District Court	B-1
C—Opinion and Judgment Below	C-1
D—Opinion of Conflicting Case	D-1
E—Newspaper Articles	E-1

Page

Cases:

Balter v. Ickes, 89 F. 2d 856 19

Byrd v. Blue Ridge Electric Cooperative, 356 U.S. 525 10

Cantrell v. Garrard, 240 S.W. 533 17

Detroit Football Co. v. Robinson, 186 F. Supp. 933, affirmed 283 F. 2d 657 12

Drye v. Eagle Rock Ranch, Inc., 264 S.W. 2d 196 14

Fagg v. Texas Co., 57 S.W. 2d 87 17

Guaranty Trust Co. of New York v. York, 326 U.S. 99 10

Hooey v. Wilson, 76 U.S. 501 18

Johnson v. Yellow Cab Transit Co., 321 U.S. 383 10

Los Angeles Rams Football Club v. Cannon, 185 F. Supp. 717 12

New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F. 2d 471 ..... 8, 10

Northern Indiana Railroad v. Michigan Central Railroad, 56 U.S. 233 19

Olmstead v. United States, 277 U.S. 438 10

Order of Railroad Telegraphers v. New Orleans, Texas and Mexico Railway, 229 F. 2d 59 19

Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 ..... 9, 11, 13, 14

Ryan v. Holcombe, 170 S.W. 2d 838 17

Shields v. Barrow, 58 U.S. 130 18

Stekoll Petroleum Co. v. Hamilton, 255 S.W. 2d 187 16

Taber v. Pettus Oil and Ref. Co., 162 S.W. 2d 959 ..... 15, 17

Wilson v. Fisher, 188 S.W. 2d 150 15

Statutes:

Texas Revised Civil Statutes, Article 3995 ..... 2, 14

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

RALPH NEELY,

Petitioner,

v.

HOUSTON OILERS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ralph Neely prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on May 18, 1966.

CITATIONS TO OPINIONS BELOW

The findings of fact and conclusions of law of the District Court are unreported and are printed in Appendix B hereto. The opinion of the Court of Appeals is printed in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1966. (A.R. 4.)[1] Rehearing was denied on June 23, 1966. (A.R. 10.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Should a Federal Court invoke the doctrine of "clean hands" to deny a professional sports organization equitable enforcement of a contract with an athlete, where the execution of such contract destroyed the amateur status and eligibility of the athlete, but was intentionally concealed and kept secret so that the individual could continue his participation in amateur athletics?

2. Does a written memorandum for the sale of real estate, and the lease thereof for a longer term than one year, violate the Texas Statute of Frauds, Article 3995 of the Texas Revised Civil Statutes, when such memorandum

[1] The record is comprised of the Transcript of Record from the Court of Appeals which incorporates the Record and Transcript of the District Court. Each document begins with a page one. References to the various parts of the Record will be made as follows: Court of Appeals Record—A.R.; District Court Record—D.R.; District Court Transcript—Tr.

does not contain all the essential terms of the agreement, and lacks a description of the real estate to be sold and terms of the lease to be executed in the future?

3. Is A an indispensable party to a suit brought by C against B where C seeks a declaratory judgment as to the validity of a contract between A and B?

4. Is D an indispensable party to a suit brought by C against B to enjoin B's performance of a contract with D when the requested injunction would effectively nullify D's contractual rights?

STATUTES INVOLVED

The only statutory provision involved is Article 3995 of the Texas Revised Civil Statutes. It is printed in full in Appendix A.

STATEMENT

Respondent instituted this suit in the Western District Court of Oklahoma by complaint seeking a declaratory judgment that it had a valid and enforceable written contract with Petitioner for Petitioner's exclusive services as a player on Respondent's professional football team, and requesting a permanent injunction to restrain and enjoin Petitioner from playing football for any other team during the term of such contract. (D.R. 1.) Jurisidiction of the District Court was based upon diversity of citizenship between the parties; the

Respondent being a Texas corporation, and the Petitioner being then a resident of Oklahoma. (D.R. 109-110.)

After a non jury trial, the Honorable Stephen S. Chandler entered judgment denying Respondent any relief under its complaint. (D.R. 136.) The Trial Court also made and filed findings of fact and conclusions of law, in which it was concluded that (1) the Service Station Site Agreement, which was an integral part of the football contract, was vague, indefinite, uncertain, and violative of the Texas Statute of Frauds (D.R. 133), and (2) the transaction giving rise to the contract was unethical and transgressed equitable and moral standards of conduct. (D.R. 132, 135.)

Respondent perfected its appeal to the Court of Appeals for the Tenth Circuit. The Court of Appeals reversed and remanded with instructions to grant the requested injunction (A.R. 4); holding that the Service Station Site Agreement was sufficiently specific to satisfy the Texas Statute of Frauds (A.R. 3, at p. 14), and that the Trial Court erroneously applied the "clean hands" doctrine because the transaction giving rise to the contract could not be considered inequitable. (A.R. 3, at p. 13.) Following the rendition of the Court of Appeals' judgment, and subject to his Petition for Rehearing, Petitioner filed a Motion to Dismiss For Lack of an Indispensable Party, on the grounds that the Service Station Site Agreement was a two party contract between himself and Ada Oil Company, and Ada Oil Company was therefore a party indispensably necessary to a full and final adjudication

of the validity and enforceability of such contract. (A.R. 5.) Such Motion was overruled by the Court of Appeals. (A.R. 10.)

FACTS

In the fall of 1964, Petitioner was a senior student at the University of Oklahoma and a member of the University's football team. (D.R. 112, 123.) The University was a member of the National Collegiate Athletic Association and the Missouri Valley Intercollegiate Athletic Association. (D.R. 113.) On November 23, 1964, the University's football team accepted a bid to play a post-season game in the Gator Bowl at Jacksonville, Florida on January 2, 1965. (Tr. 210-211.) The acceptance of such bid was publicly announced. (Tr. 41.)

On November 29, 1964, Petitioner was in New York to accept an award (Tr. 134-135), where he was contacted by John Breen, Respondent's Personnel Director, about signing a contract to play professional football for Respondent's professional team, the Houston Oilers. (Tr. 18-19.) At the time of this initial contact, Breen knew of Petitioner's contemplated participation in the post-season collegiate game on January 2, 1965. (Tr. 41, 80.) The following day, November 30, 1964, Petitioner and his father-in-law, R. A. Forte, accompanied Breen to Houston, Texas, for a meeting with K. S. Adams, Jr. and Carroll Martin, Respondent's President and General Manager, respectively. (Tr. 46-48.)

At the time of such meeting, Adams, Martin and Breen knew that Petitioner would become ineligible to participate

in the Gator Bowl Game if he executed a contract to play professional football with the Houston Oilers prior to such game. (Tr. 42-43, 79-81, 91.) Petitioner told them that he wanted to play in the Gator Bowl Game. (Tr. 156.) Nevertheless, Adams orally offered Petitioner various inducements to sign a professional contract immediately. (Tr. 48-50.) A general discussion was had concerning Adams' offer, the desirability of Petitioner's getting his bonus in the year 1964 for tax purposes, and the effect of the transaction on Petitioner's amateur status and eligibility. (Tr. 88-91.) The meeting was then adjourned to enable Petitioner to discuss Adams' offers and inducements with his wife and father-in-law. (Tr. 91.)

Petitioner and his father-in-law again met with Adams and Martin on the following day, December 1, 1964. (Tr. 52.) When Petitioner expressed hesitancy about the proposed professional contract, Martin advised him that if the offer was not accepted immediately, it would be withdrawn. (Tr. 149.) Adams had previously told Petitioner of withdrawing an offer to another amateur athlete and subsequently offering him less money. (Tr. 150.) Petitioner testified he was told, "That this was it, I had to make up my mind this afternoon and if I didn't, that they would withdraw their offer." (Tr. 152.) When Petitioner again advised Adams and Martin that he still wanted to play in the Gator Bowl Game, they represented to him that his execution of the contract would remain confidential between the four persons present at the meeting; that it would not be publicized until after the Gator Bowl Game; that the contracts would not be dated;

and that his signing thereof would be publicly "assimilated" immediately following the Gator Bowl Game. (Tr. 81, 156-157, D.R. 126.)

Believing that the contract would not become effective until after the Gator Bowl Game (D.R. 129, Tr. 206-207), Petitioner thereupon signed the four American Football League Standard Players' Contracts, and the bonus clause. (D.R. 110, 126.) Adams also executed and delivered to Petitioner a letter guaranteeing Petitioner certain minimum commissions as a real estate salesman during the years 1965 through 1968. (D.R. 111, 127.) Likewise Adams, as President of Ada Oil Company, signed and delivered to Petitioner the Service Station Site Agreement. (D.R. 111, 127.) The real estate commission letter and the Service Station Site Agreement were dated December 1, 1964, but the four AFL contracts, and bonus clause, were left undated (D.R. 110-111, 126-127.) Thereupon, Adams and Martin delivered to Petitioner's father-in-law a $25,000 bonus check, payable to R. A. Forte, Trustee. (D.R. 111, 127.)

On December 29, 1964, Petitioner attempted to revoke and rescind the contracts with Respondent and Ada Oil Company, by mailing letters to the Houston Oilers and Adams, and by having Forte return the bonus check. (D.R. 112.) Such communications were received by Respondent and Adams on December 31, 1964. (D.R. 112.) Shortly following his letters to Respondent and Adams, Petitioner informed his college coach of the contract signing, but explained that he had returned the papers and the money. (Tr. 200-201.) On the evening of December 31, 1964, and the morning of

January 1, 1965, nationwide news media began publicizing stories that Petitioner had signed a contract to play professional football with Respondent. (Tr. 84-85, 161.) On January 1, 1965, Petitioner was informed by his college coach that he had been declared ineligible to play in the Gator Bowl Game. (Tr. 161-162.) Subsequently, Petitioner signed contracts to play professional football with the Dallas Cowboys Football Club, of the National Football League, during the 1965 through 1968 seasons. (D.R. 112.) Petitioner has been performing services under this contract, and playing football for the Dallas Cowboys Football Club, pending the outcome of this suit. (D.R. 112-113.)

REASONS FOR GRANTING THE WRIT

1. The Tenth Circuit Court of Appeals' decision in the instant case is in direct conflict with a decision by the Fifth Circuit Court of Appeals in *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F. 2d 471 (1961). The Fifth Circuit opinion is printed in Appendix D hereto. The Tenth Circuit seemed to recognize such conflict, but expressly declined to follow the holding of the Fifth Circuit.

A. *Existence of the Conflict:* The conflict concerns the application of the equitable doctrine: "He who comes into equity must come with clean hands." In both of the subject cases, the Plaintiff professional team contracted with a college player prior to his participation in a post-season college game. Such signing terminated the player's amateur eligibil-

ity under the conference and athletic association rules. In both cases, the Plaintiff induced the contract execution by agreeing to keep it a secret, in order to conceal the player's disqualification for the post-season college games. Both disputes arose over the validity of the contract which the professional teams had agreed to keep secret. In the *New York Football Giants, Inc.* case, the Fifth Circuit stated that the controversy arose because the Plaintiff took from the player what it claimed to be a binding contract, but which it agreed with the player to, in effect, represent to all others was not in existence, and held that a court of equity would not intervene to resolve the controversy created by such bad faith and deceit on the Plaintiff's part. In the instant case, and on identical facts, the Tenth Circuit held that such deceit would not justify a denial of relief to the Plaintiff. In so ruling, the Tenth Circuit expressly declined to follow the Fifth Circuit case, if its holding was that this equitable doctrine should apply whenever a college football player and a professional organization contracted before a post-season game, with an understanding to keep the contract secret in order to permit the player to compete in such game. Such was clearly the holding of the Fifth Circuit, resulting in a direct conflict.

b. *Federal Nature of the Question:* The "clean hands" doctrine is an essential and integral part of Federal practice and procedure, and the Federal Courts' administration of justice. Involved is one of the greatest powers of any court, i.e., the power to deny a complaining party a forum. An application of the doctrine by a Federal Court does not involve, or depend upon, state or local law. The doctrine "is a self-imposed ordinance" that denies an inequitable Plaintiff any

relief from a chancery court because the court will not be "an abettor of the iniquity." *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945). Mr. Justice Brandeis spelled out the rationale for the doctrine in his dissent to *Olmstead v. United States*, 277 U.S. 438, 484-485 (1928):

> "[A]id is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself."[2]

Mr. Justice Brandeis' observation in *Olmstead* that the Court protects itself by application of the doctrine was quoted with approval by Mr. Justice Frankfurter in his dissenting opinion to *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 403 (1944). Such decisions and quotations reveal the true nature of the doctrine as an inherent protective device for the Court itself, completely independent of state law. The Federal judiciary is an independent system with characteristics essential to that system, *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), and State Courts cannot define the remedies available in a Federal Court. *Guaranty Trust Co. of New York v. York*,

[2] The Fifth Circuit Court of Appeals in the *New York Football Giants, Inc.* case applied the doctrine although it had not been applied by the lower Court or asserted or argued by the parties.

326 U.S. 99, 105 (1945). In order to protect itself from being a participant in the "iniquity", and in order to promote confidence in the federal administration of justice, a Federal Court must make an independent determination of when the doctrine is to be applied. It cannot be bound by some lesser, or differing, standard promulgated by local courts.

New York Football Giants, Inc. was a diversity case, but the Fifth Circuit properly followed standards of the Federal Courts in applying the doctrine, citing as sole authority *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.* 324 U.S. 806, 814 (1945). On the other hand, the Tenth Circuit in the instant case cited both Federal and Texas cases, and then declined to follow the standards announced by the Federal Courts.

c. *Importance of the Question:* The "clean hands" doctrine can arise in any equitable proceeding, and an application thereof effects an ultimate resolution of the entire controversy. There can be no place in the Federal system for contradictory pronouncements on moral and equitable standards, and any conflict on such an important issue must be eliminated. Moreover, the impact of this conflict is not limited merely to the sport of football. Such schemes as described in both the conflicting cases, when practiced by any type professional sports organization, will greatly damage and, if allowed to continue, might well destroy organized amateur athletics.

The value of organized athletics to the well being of individuals and nations has been recognized from the beginning of man and needs no elaboration here. In addition to the

promotion of physical fitness and well being, amateur athletics play an important role in the establishment and maintenance of international good will and relations, as exemplified by the Olympic Games. In this connection, the distinction between an athlete's professional and amateur status has been recognized for decades, and is deemed of utmost importance by persons concerned with organized athletics throughout the world. The schemes and practices in the two subject cases render meaningless the distinction between amateur and professional, and therefore threaten the welfare and continued existence of amateur athletics. Additionally, consider the harmful effect upon this nation of having it subsequently disclosed that a participant in an international amateur athletic event, such as the Olympic Games, had in fact signed a professional contract prior to his participation therein.

The situation posed by the conflicting cases has occurred numerous times in the past,[3] and will undoubtedly be the subject of much future litigation in the Federal Courts. Despite the recent merger of the National Football League and the American Football League the problem will remain. All professional sports are becoming increasingly popular with the public, and are so immensely profitable for their promoters that the heated competition for amateur athletes will unquestionably continue. A new professional football league, well financed and staffed, has

[3] The following cases involve substantially the same facts as the instant case: *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp. 717 (S.D. Calif. 1960); *Detroit Football Co. v. Robinson*, 186 F. Supp. 933 (E.D. La. 1960) aff'd 283 F. 2d 657 (5th Cir, 1960).

already been established to compete with the merged AFL and NFL, and has announced that it intends to spend $24,000,000 in the first year of its draft. The league has vowed to seek the best college and amateur players, with outstanding players being offered sums up to $500,000 (printed in Appendix E are newspaper reports concerning the formation and plans of this new league). Additional competition is already furnished by the Continental and Canadian Football Leagues. Moreover, this problem can and does arise in any area of athletics or games where the amateur-professional status is maintained, and where a versatile athlete is desired and sought by different professional organizations. A reconciliation of the standards to be applied to such cases is not only highly desirable, but will prove to be absolutely necessary.

d. *The Decision Below is Erroneous:* The erroneous decision of the Tenth Circuit in the instant case completely disregarded the fundamental nature of the "clean hands" doctrine, and ignored this Court's stated requirement that a plaintiff in a Federal Court must have acted "without * * * deceit as to the controversy in issue." *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945). The deceit practiced in the instant case directly concerns the existence and validity of the contract sued upon, i.e., the very controversy in issue. The scheme of plaintiff in the instant case was even more deceitful than that in the *New York Football Giants, Inc.* case, because here the parties not only agreed to keep the contract signing a secret, but also agreed to simulate the later signing of the contract for the benefit of a national television audi-

ence following the post-season game. The deception was practiced upon thousands of persons, including the schools involved, the other college players and the public in general. The Tenth Circuit decision encourages such activities, and in effect rewards unfair, deceitful and inequitable conduct.

The Fifth Circuit, on the other hand, recognized the important principles involved, and acted to preserve the standards of the Federal Court, as well as to protect organized amateur athletics. The superiority of the Fifth Circuit's position is obvious, and there was no justification for the Tenth Circuit's ruling that Judge Chandler abused his discretion in following the Fifth Circuit decision on identical facts, and in his reliance upon *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945). Petitioner respectfully submits that standards of equity and morality should not be subject to change merely by crossing boundary lines of courts of appeals.

2. A second basis for review of this case is that the decision of the Court below is in conflict with the applicable law of the State of Texas on the Texas Statute of Frauds, Article 3995 of the Texas Revised Civil Statutes (Appendix A), which provides that no action may be brought in any Court upon a contract for the sale of real estate, or the lease thereof for a term longer than one (1) year, unless the agreement, or some memoranda thereof, shall be in writing.

a. *Importance Of The Question:* Texas substantive law was applicable to the instant case (D.R. 133). The Texas Statute of Frauds is an important part of Texas land law, and is vigorously enforced by the Courts of Texas.

As recently as 1963, the Texas Supreme Court noted that the Statute has "been in force since the days of the Republic of Texas. [Its] interpretation has become an integral and fundamental part of the land law of this state." *Drye v. Eagle Rock Ranch, Inc.*, 264 S.W. 2d 196, 203 (1963).

b. *Conflict With Applicable State Law:* The decision of the Tenth Circuit overruling Judge Chandler on this issue is in direct conflict with established precedents by the Texas Courts. It is fundamental that the memorandum required by the Statute must contain the essential terms of the contract, expressed with such certainty and clarity that it may be understood without recourse to parol evidence to show the intention of the parties. *Wilson v. Fisher*, 188 S.W. 2d 150 (Tex. S. Ct. 1945). Any such memorandum must describe the subject matter in such a fashion that it can be identified. *Taber v. Pettus Oil and Ref. Co.*, 162 S.W. 2d 959 (Comm. App. 1942, Opinion adopted by the Supreme Court). The Tenth Circuit erroneously held that these basic and fundamental requirements were met by the Service Station Site Agreement. (Tr. 196.)

The writing in question, which is one of the seven documents alleged by Respondent to constitute the one indivisible contract in controversy (D.R. 2, 128), provides for both the sale of real estate, and the lease thereof for a term of twenty years. Specifically, it provides that Ada Oil Company is "to purchase a suitable service station site in the Harris County, Texas area", finance and construct thereon a service station, "then enter into Phillips Petroleum Company's standard Two-Party Lease Agreements for a

term of twenty years", "procure a twenty (20) year loan", and "then convey said service station site and improvements" to Petitioner by a deed subject to lease and mortgage. It further provides that Petitioner "shall assume the payment of said loan".

The Tenth Circuit held that the provision for "a suitable service station site" provided sufficient criteria for Ada Oil Company's selection thereof, without the necessity for further agreement. Such holding is in direct conflict with that of the Texas Supreme Court in *Stekoll Petroleum Co. v. Hamilton*, 255 S.W. 2d 187 (1953), where the parties provided that the buyer was to select 4,000 acres from a block of 5,000 acres (fully described), leaving the seller 1,000 acres "equitably checker-boarded in a fashion similar to the checker-boarding in the first block". The Supreme Court held such provision too "indefinite and uncertain" to satisfy the Statute of Frauds, because there was no "statement of data or means or a method by which, when followed, the land will be certainly and clearly identified". 255 S.W. 2d at page 192.

An equally blatant conflict exists as regards the execution of the twenty year lease. The only specification is that Ada Oil Company will "enter into Phillips Petroleum Company's standard Two-Party Lease Agreements"; failing to specify the identity of the lessee, or the terms, provisions and conditions of such lease agreements. There was no evidence in the Record to establish that "Phillips Petroleum Company's standard Two-Party Lease Agreements" were existing written instruments from which the terms of the lease could

be ascertained. Even if such evidence had existed, the Texas Courts have held insufficient contracts providing for the future execution of a "Texas Standard Form No. 86", *Taber v. Pettus Oil and Ref. Co.*, 162 S.W. 2d 959 (Comm. App. 1942, Opinion adopted by the Supreme Court), a "88 Form Lease", *Fagg v. Texas Co.*, 57 S.W. 2d 87 (Comm. App. 1933, Decision adopted by the Supreme Court), an "oil and gas lease", *Ryan v. Holcombe*, 170 S.W. 2d 838 (Tex. Civ. App. 1943, n.w.h.), and a "commercial lease, providing for one-eighth (1/8) royalty", *Cantrell v. Garrard*, 240 S.W. 533 (Comm. App. 1922, Opinion adopted by the Supreme Court).

c. *Effect Of The Judgment Below:* If the Tenth Circuit's judgment is allowed to stand, and the injunction against the Petitioner is entered, he will be required either to subject himself to the whim and fancies of Ada Oil Company, as it fills in all missing elements of the Service Station Site Agreement, or give up his occupation. Such injunction in effect denies Petitioner an opportunity to pursue his livelihood unless he is willing to purchase a service station on any site selected by Ada Oil Company in the Harris County, Texas, area, at a price to be set in the future by Ada Oil Company, and subject to a lease with some unknown third party which may contain any terms that Ada Oil Company chooses to insert.

If Petitioner's obligations under the Service Station Site Agreement were all that were in issue here, he would not be particularly injured by such erroneous holding that the contract was valid. He could merely refuse to perform under the contract and then successfully defend any damage suit

against him in the Texas Courts. However, the injunction in the instant case forces him either to subject himself to the uncertainties, and the potentially huge liabilities, of the Service Station Site Agreement or abandon his livelihood as a professional football player.

3. The third basis for review of this case is the fact that Ada Oil Company was not a party to the suit, but was indispensable to a full and final adjudication of the controversy. The issue was raised by Petitioner in the Tenth Circuit by a Motion to Dismiss For Lack of an Indispensable Party. (A.R. 5.) Such issue may properly be raised by a party, or by the Court on its own motion, on appeal. *Hooey v. Wilson*, 76 U.S. 501 (1870).

The classic definition of indispensable parties is set forth in *Shields v. Barrow*, 58 U.S. 130, 139 (1854):

> "* * *[P]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience."

The Service Station Site Agreement between Ada Oil Company and Petitioner is alleged by Respondent to be a part of the overall indivisible contract in controversy. (D.R. 2, 128.) Respondent sought a declaratory judgment that the entire indivisible contract was valid (D.R. 8-9), and Petitioner defended on the ground that his contract with Ada Oil Company was void and unenforceable. (D.R. 62.) It is therefore obvious that a final judgment or decree cannot be entered in this controversy without materially affecting the

interest of the absent Ada Oil Company. Neither will such an adjudication finally settle or resolve the question of whether the agreement between Petitioner and Ada Oil Company is valid or invalid. In this connection, this very issue is already the subject of litigation between Petitioner and Ada Oil Company in the Texas Courts. There is presently pending in the 133rd District Court of Harris County, Texas, a suit styled "Ralph Neely, Plaintiff, vs. Ada Oil Company, Defendant", Cause No. 703019, wherein Petitioner seeks a Declaratory Judgment that the subject agreement is violative of the Texas Statute of Frauds, and therefore unenforceable. (A.R. 8.)

4. The fourth basis for review of this case is the fact that the Dallas Cowboys Football Club, Inc. was not a party to the suit, but was indispensable to a full and final adjudication of the controversy. Petitioner has been performing services for the Dallas Cowboys Football Club, Inc. under his contract of January 1, 1965. The effect of the injunction ordered by the Tenth Circuit is to bar Petitioner's further performance of such services, and therefore to deprive the Dallas Cowboys Football Club, Inc. of its contract rights. When a party's contractual rights will be effectively invalidated by an injunction, such party is an indispensable party to the injunction suit. *Northern Indiana Railroad v. Michigan Central Railroad*, 56 U.S. 233 (1853); *Balter v. Ickes*, 89 F. 2d 856 (D.C. Cir. 1937, cert. den., 301 U.S. 709); and *Order of Railroad Telegraphers v. New Orleans, Texas and Mexico Railway*, 229 F. 2d 59 (8th Cir. 1956).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ANGUS G. WYNNE,

JAMES D. FELLERS,

J. HOWARD EDMONDSON,
Counsel for Petitioner.

July 30, 1966

Art. 3995. Writing required

No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:

1. To charge any executor or administrator upon any promise to answer any debt or damage due from his testator or intestate, out of his own estate; or,

2. To charge any person upon a promise to answer for the debt, default or miscarriage of another; or,

3. To charge any person upon any agreement made upon consideration of marriage; or,

4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or,

5. Upon any agreement which is not to be performed within the space of one year from the making thereof. Acts 1840, p. 28; P. D. 3875; G.L. vol. 2, p. 202.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HOUSTON OILERS, INC.,
Plaintiff,

vs.

Civil No. 65-18

RALPH NEELY,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause came on regularly for trial on June 21, 1965, without a jury.

Plaintiff appeared by its attorneys, William R. Eckhardt, of the firm of Vinson, Elkins, Weems & Searles of Houston, Texas, and Gus Rinehart, of the firm of Rinehart and Morrison, Oklahoma City, Oklahoma.

Defendant appeared by his attorneys, Thomas J. Moroney, Jr., Angus Wynne of the firm of Wynne, Jaffe & Tinsley of Dallas, Texas, and J. Howard Edmondson of the firm of Fellers, Snider, Baggett & McLane of Oklahoma City, Oklahoma.

The trial was concluded on the 22nd day of June, 1965, and the Court, having heard and considered the evidence and statements of counsel, makes the following

FINDINGS OF FACT

I.

Plaintiff, Houston Oilers, Inc., is a corporation duly organized and existing under the laws of Texas, with its principal place of business in Houston. It owns and operates a professional football team known as Houston Oilers which is a member of the American Football League, a league composed of teams which operate and play professional football in various cities in the United States. At all pertinent times K. S. ADAMS, JR., was President, CARROLL MARTIN General Manager, and JOHN BREEN an employee of said Corporation.

II.

Defendant, RALPH NEELY, an individual, attained the age of 21 years on September 12, 1964 and at all pertinent times resided in Norman, Oklahoma, within the Western District of Oklahoma, was a student at the University of Oklahoma and a member of the University football team.

III.

Under the provisions of the Constitution and By-Laws of the American Football League, NEELY, who became eligible to be selected and placed under contract by a member team on November 28, 1964, was selected by Houston Oilers as one of its draft choices.

IV.

BREEN, acting as agent for the plaintiff, contacted NEELY and his father-in-law, R. A. FORTE, in New York

City on November 29, 1964, stating to them that he had authority to pay NEELY a $25,000 bonus if he would sign a contract to play professional football for Houston Oilers. BREEN further advised them that it would be necessary to discuss other considerations in connection with such a contract with the officers of Houston Oilers in Houston, Texas.

V.

NEELY and FORTE traveled with BREEN by plane from New York to Houston. Plaintiff paid the difference in their transportation costs from New York City to Oklahoma City via Houston and their expenses while in Houston where they met with ADAMS and MARTIN on November 30 and December 1, 1964, and discussed the terms under which NEELY was willing to play for plaintiff.

VI.

NEELY advised ADAMS and MARTIN of his desire to remain eligible to play in the post-season Gator Bowl game on January 2, 1965, but stated that as soon as possible he wanted to finally decide which professional club he would play for and wanted to obtain the cash bonus during the calendar year 1964 so that he could include it in his 1964 income tax return. ADAMS stated that he was not willing to pay the $25,000 bonus until NEELY signed a Players Contract with Houston Oilers.

VII.

It was important to both plaintiff and defendant that NEELY remain eligible to play in the Gator Bowl game and NEELY was *unwilling to make any agreement that would render him ineligible to play in that game.* ADAMS advised NEELY that if he signed a contract to play for the Houston Oilers he would be eligible to play in that game if it was kept strictly secret until after the completion of the game at which time the contract could be finalized. ADAMS and MARTIN agreed to keep the fact strictly secret if NEELY would sign such a contract. Unknown to NEELY, they either intended at the time to immediately send a copy of any contract NEELY signed to the Commissioner of the American Football League, or shortly after NEELY signed the contract involved here they decided to do so in violation of the oral agreement.

VIII.

Relying on their statements on December 1, 1964, NEELY signed the bonus clause, and four American Football League Standard Players Contract forms, each containing a no-cut clause, (Exhibits 1, 2, 3, 4 and 5 respectively), the last four instruments covering the football seasons for 1965, 1966, 1967 and 1968. On the same day MARTIN, acting for plaintiff, signed the same instruments. Each of these instruments was executed in TRIPLICATE and all were undated, that is, the space for the date was left blank and no date was inserted.

IX.

On the same date, as additional consideration to NEELY, ADAMS executed a Real Estate Saleman's Agreement (Plaintiff's Exhibit 6) and a Service Station Site Agreement (Plaintiff's Exhibit 7). NEELY also executed the Service Station Site Agreement. These two instruments (Plaintiff's Exhibits 6 and 7) when signed by the parties contained the typed date, December 1, 1964.

X.

After all of the contracts were executed, a check for $25,000 dated December 1, 1964, payable to R. A. FORTE, Trustee, drawn on the account of Houston Oilers, Inc., at the Medical Center National Bank, Houston, Texas, representing the bonus, was delivered by ADAMS and MARTIN to FORTE, with NEELY'S knowledge and consent, (Plaintiff's Exhibit 11) and NEELY was given one signed copy of the bonus clause and each of the Players Standard Contracts marked "PLAYERS' COPY" (Exhibits 1 through 5) as well as the original Real Estate Salesman's Agreement and Service Station Site Agreement (Plaintiff's Exhibits 6 and 7).

XI.

All of the written instruments and oral agreements constituted in fact one single transaction.

XII.

When NEELY executed the bonus contract and the American Football League Standard Players Contracts

he expected to be eligible to participate in the Gator Bowl game on January 2, 1965. He knew that the Constitution and By-Laws of the National Collegiate Athletic Association provided that a player could not accept pay or agree to accept pay for participation in athletics and be eligible to play, but believed that the contracts would not become effective until after the game on January 2, 1965. He relied on the representations of ADAMS as to his eligibility if the agreement was kept secret and the agreement of ADAMS and MARTIN to keep it secret. He was thereby induced to execute the instruments.

XIII.

Thereafter, the Plaintiff, in violation of the agreement with NEELY that the contracts would be kept secret until after the Gator Bowl game on January 2, 1965, *inserted the date "December 1, 1964"*, in the executed undated forms and on December 7, 1964, mailed one copy of each to the Commissioner of the American Football League who took no action with reference thereto.

XIV.

On December 29, 1964, NEELY mailed letters to Houston Oilers, Inc. (Defendant's Exhibit 6) and ADAMS, as President of Ada Oil Company (Defendant's Exhibit 7) rejecting Plaintiff's offer to Defendant and withdrawing any offer Defendant might have made to Plaintiff. On the same day, FORTE mailed to Houston Oilers, Inc. a letter (Defendant's Exhibit 8), enclosing the $25,000 check (Plaintiff's Exhibit 11). These letters and the check were

received by HOUSTON OILERS and ADAMS on December 31, 1964.

XV.

The dating and mailing of such instruments to the Commissioner of the American Football League was unknown to NEELY until December 31, 1964, when he was informed of the fact that the press had released information that he had agreed to play football for the Houston Oilers. He was thereafter declared ineligible to participate in the Gator Bowl game.

XVI.

From all of the evidence, the circumstances surrounding the transaction, the demeanor of the witnesses on the stand, it is determined that NEELY would not have executed the contracts had he not been led to believe that there was no possibility for him to be declared ineligible to play in said Gator Bowl game thereby "letting down his teammates and his college"; that he trusted Mr. Adams implicitly, and that he was induced to execute said instruments by the statements of ADAMS and MARTIN.

XVII.

The transaction between the parties was not at "arms length". Plaintiff was charged with a high degree of good faith in dealing with the Defendant, a college student, because of the public nature of the contract and the wide difference in the financial standards, age and experience of the parties.

XVIII.

The execution of such contracts is a public matter involving moral and ethical standards. It is more serious in that it involves college sports, young people, and educational institutions. The effect of carrying out such an agreement would be to dupe the public. Such a transaction is unethical and transgresses equitable and moral standards of conduct.

CONCLUSIONS OF LAW

From the foregoing facts, the Court concludes as a matter of law that

I.

The Court has jurisdiction of this action under the provisions of Title 28, Section 1332 and Section 2201, United States Code.

II.

The transaction should be construed under the laws of the State of Texas.

III.

The Service Station Site Agreement is violative of the Statute of Frauds of the State of Texas, Article 3995, Revised Civil Statutes of Texas, as amended, Vernon's Annotated Texas Statutes, Article 3995, in that it is vague, indefinite and uncertain and is unenforceable.

IV.

All of the written instruments and oral agreements constituted one single transaction.

V.

Defendant was not legally bound by the contract.

VI.

The agreement is against public policy and void.

VII.

Even if a binding contract was actually consummated, Defendant had a legal right to rescind it (1) because of the material misrepresentation that he would remain eligible if the facts were kept secret and (2) because of the violation by Plaintiff of the agreement to keep it secret.

VIII.

The fact that the Plaintiff did not intend to keep the agreement secret at the time the agreement was made constituted fraud in the inducement of the contract also making it subject to rescission. On the other hand, if Plaintiff did not decide to send the contract to the Commissioner of the American Football League until later, such act likewise constituted a breach of the contract.

IX.

Defendant's letters dated December 29, 1964, and the return of the bonus check effectively rescinded the contract if one existed, and, if none existed, effectively rejected any offer of plaintiff and withdrew any offer of defendant.

X.

The plaintiff caused the defendant to lose his eligibility by inducing him to execute said instruments, causing damage to his reputation and person.

XI.

The request for a declaratory judgment should be denied and all of the alleged contracts found to be invalid and of no force and effect.

XII.

Plaintiff is not entitled to equitable relief. The application for injunction should be denied.

XIII.

The Complaint of the Plaintiff should be dismissed with prejudice, the Plaintiff being entitled to no relief. Defendant should have judgment for all legal costs.

JUDGMENT

It is ORDERED and ADJUDGED that

The purported contract or contracts between the Plaintiff and Defendant are invalid and of no force and effect.

The application for a declaratory judgment is denied. The application for an injunction is denied. Plaintiff is denied any relief against the Defendant. The complaint is dismissed with prejudice. Judgment is awarded Defendant for all legal costs.

DATED this the 15th day of September, 1965.

/s/ STEPHEN S. CHANDLER

Stephen S. Chandler, *Chief Judge*

Judgment entered in Civil Docket on September 16, 1965

Adelaide Holston, Deputy.

APPENDIX C

C-1

FILED
United States Court of Appeals
Tenth Circuit
May 18, 1966
Robert B. Cartwright
Clerk

United States Court of Appeals

TENTH CIRCUIT

NO. 8520—MARCH TERM—1966

HOUSTON OILERS, INC.,

Appellant,

vs.

RALPH NEELY,

Appellee.

Appeal From The United States District Court For The Western District Of Oklahoma.

William R. Eckhardt of the firm of Vinson, Elkins, Weems & Searls, Houston, Texas, and Gus Rinehart of the firm of Rinehart & Morrison, Oklahoma City, Oklahoma, for Appellant.

James D. Fellers of the firm of Fellers, Snider, Baggett & McLane, Oklahoma City, Oklahoma, and Thomas J. Moroney, Jr., of the firm of Wynne, Jaffe & Tinsley, Dallas, Texas, (Angus G. Wynne, Dallas, Texas, and J. Howard Edmondson, Oklahoma City, Oklahoma, with them on the brief) for Appellee.

Before PICKETT, HILL and SETH, Circuit Judges.

PICKETT, Circuit Judge.

This appeal concerns the validity of a professional football contract signed by Ralph Neely, a University of Oklahoma football player, and Houston Oilers, Inc., a Texas corporation which owns and operates a professional football team in the American Football League. Neely, a high school athlete of great promise, graduated from the Farmington, New Mexico high school in 1961, and found his way to the University of Oklahoma at Norman, Oklahoma. There his proficiency in football continued to develop, and in his senior year he became one of the nation's outstanding collegiate football players. He intended to play professional football and desired to take full advantage of the financial benefits arising from the rapidly growing popularity of professional football and the rivalry existing between the two major professional football leagues. Upon completion of the regular football schedule at the University of Oklahoma on November 28, 1964, the right to contract for Neely's services was awarded under a draft process to the Houston Oilers in the American Football League and to the Baltimore Colts in the National Football League.[1] On December 1, 1964, Neely signed American Football League Standard Players Contracts with Houston, each containing a "no-cut" clause, for the seasons 1965 through 1968, and received therefor a $25,000 bonus check. Thereafter Neely signed contracts with the Dallas Cowboys of the National Football League, which had acquired Baltimore's draft rights to Neely, and returned the Houston contracts and the $25,000 bonus check.

[1] Under the rules of both leagues, a club which selects a player in the regular course of the draft owns the exclusive right to contract for the services of that player.

Houston thereupon brought this action for a judgment, declaring its contract with Neely to be valid and enforceable, and for an injunction restraining him from playing professional football with any team other than Houston. The trial court, in denying the relief sought, found that the contract was tainted with fraud and violative of the Texas Statute of Frauds. We hold that the undisputed facts in the record disclose a valid and enforceable contract.

Immediately after the draft on November 28, 1964, both Baltimore and Houston had set in motion their contract machinery to acquire the services of Neely. On that date Neely, while enroute to New York City to accept honors awarded him as an All-American choice and to participate in the Ed Sullivan television show, discussed his plans with representatives of the Baltimore team and was given a firm offer to sign a contract. On the same day, Breen, the personnel director of the Houston team, went to New York for the sole purpose of obtaining a commitment from Neely. Neely was accompanied by his father-in-law, Robert Forte, an Oklahoma City businessman, who participated in all the negotiations as advisor to Neely. In New York City, Neely advised Breen of the Baltimore offer,[2] but indicated that he preferred to play in the southwest. Neely told Breen that in any contract negotiations he wanted to discuss an arrangement for off-season work. Breen assured Neely and Forte that such an arrangement could be worked out, but only K. S. Adams, Jr., President of the Houston Club, could

[2] This offer was stated to be a $25,000 bonus and a four-year contract starting at $16,000 per year and escalating to $25,000 for the fourth year.

discuss such proposals. For the purpose of continuing contract discussions, the three traveled to Houston, arriving there on November 30th. At a meeting attended by Neely, Forte, Adams and Martin, the club's General Manager, a four-year contract with a "no-cut" clause was offered to Neely. The offer provided for a $25,000 bonus and a salary of $16,000 per year. In addition, Adams agreed to secure employment for Neely with a local real estate firm at a guaranteed annual income of not less than $5,000. Adams also agreed that an oil company which he owned and controlled would construct a "conventional Phillips '66 Service Station" on a suitable location in Harris County, Texas, at an approximate cost of $30,000 to $60,000, and convey the same to Neely by special warranty deed, subject to the Phillips '66 lease and a deed of trust.

Neely was impressed with the offer but desired further time to consider it. On December 1, 1964, Adams was advised that the offer was accepted. In the meantime, Neely had conferred with his wife and the owner of the Baltimore Club. The Standard Players Contracts were then prepared and executed by the parties[3], but were left undated. The letter agreement for additional employment, the filling station agreement, and the bonus check were dated December 1, 1964 and executed and delivered on that date. It is stipulated that these instruments constitute a single transaction. From the beginning of the discussions, Neely, for tax reasons, had insisted that the bonus money must be paid in 1964, and further, that the signing of the contract and the acceptance

[3] These player contracts are identical to those signed by all A.F.L. players and, in substance, are the same as those used in the N.F.L.

of the bonus money be kept secret to prevent him being declared ineligible to participate in the post-season Gator Bowl game on January 2, 1965, to which the University of Oklahoma had accepted an invitation. Any rational consideration of the evidence leads to the conclusion that all the parties knew that if Neely signed a professional football contract and received money therefor, under the rules of the N.C.A.A. and the Big Eight Conference, of which the University of Oklahoma was a member, he would consequently become ineligible to compete in the post-season game. Neely and Forte were advised that such a large sum of money could not be paid without a signed contract. It was then agreed that when the contract was signed, the $25,000 bonus check would be made payable to Forte as Trustee and that all the contract transactions would remain confidential, with no public announcement until after the Gator Bowl game.

After the contracts were executed, copies were delivered to Neely, he and Forte returned to Oklahoma. Later that day Houston's General Manager inserted the date "December 1, 1964" on the Standard Players Contracts and thereafter copies were filed with the A.F.L. Commissioner. Neely testified that he understood the arrangement to mean that the contracts would not be effective or filed until after the post-season game. However the contracts provide in plain language that they shall be valid and binding immediately upon execution and that a copy shall be filed with the League

Commissioner within ten days thereafter[4]. The A.F.L. rules also require the filing of all player contracts within 10 days after execution.

Immediately upon his return to Oklahoma, Neely was advised that the Dallas Cowboys, another team in the N.F.L., had obtained Baltimore draft rights and desired contract discussions with him. Forte made several trips on behalf of Neely, and, unknown to Houston, Neely's contracts were forwarded to Dallas' attorneys for examination. Neely signed letters dated December 29, 1964, prepared by attorneys for Dallas, addressed to Houston and Adams, advising that he did not consider himself bound by the contracts and was withdrawing therefrom. The $25,000 bonus check was returned. These letters were received by Houston and Adams on December 31st. On that date the Dallas Club deposited $25,000 to the account of Neely in a Dallas bank. Prior to any publicity of the matter, Neely, apparently sensing trouble after the return of the Houston contracts, advised his coach in Jacksonville, Florida, where the Oklahoma team was preparing for the Gator Bowl game, of his activities in regard to the Houston contract. At about midnight on December 31st, Neely was notified that there had

[4] Each of the Players Contracts contain this provision:

"18. Upon its execution, this contract shall be valid and binding immediately upon the parties hereto. A copy of this contract shall be filed by the club with the Commissioner within ten (10) days after execution. Within ten (10) days after its filing in the League office, the Commissioner shall have the right to terminate this contract by his disapproval in accordance with and pursuant to the powers vested in him by the Constitution and the By-Laws of the League. If so terminated, the Commissioner shall promptly give both parties written notice of such termination and thereupon both parties shall be relieved of their respective rights and obligations hereunder."

been some publicity concerning his signing with Houston. On January 1, 1965, Neely was advised that he had been declared ineligible to participate in the Gator Bowl game. There is no evidence from which it can be inferred that any publicity by Houston brought about this action. That evening Neely signed a contract to play with Dallas for the 1965 through 1968 seasons. He played for Dallas during the 1965 season and will continue to do so unless enjoined therefrom.

Neely was over the age of 21 years, and it is stipulated that he had "special, exceptional, unique knowledge, skill and ability as a football player." He was competent to enter into a valid contract to perform these services exclusively for a designated person or organization, and upon agreeing to so limit his services, he was subject under Texas law, which the parties agree is controlling, to be enjoined from performing them for anyone else[5]. Dallas Cowboys Football Club, Inc. v. Harris, Tex., 348 S.W. 2d 37; Mission Independent School Dist. v. Diserens, Tex., 188 S.W. 568.

Disagreement over the validity of these contracts does not arise out of the provisions contained therein, but from an extrinsic oral understanding that their existence was to be kept secret until after the post-season game. The essence of Neely's contentions before the trial court and here is that the contract are unenforceable because Houston falsely rep-

[5] The players contracts signed by Neely provide:

"5. The Player promises and agrees that during the term of this contract he will not play football or engage in activities related to football for any other person, firm, corporation or institution except with prior written consent of the Club and the Commissioner. * * *"

resented that the effective date of the agreement would be January 2, 1965, and that Houston's filing of the contract copies with the Commissioner was a violation of its promise to keep the matter secret. The trial court was of the opinion that these alleged misrepresentations constituted fraud in the inducement of the contract which would subject it to rescission[6]. As has been heretofore stated, each contract specifically provides otherwise. Neely does not say he was so naive that he did not know his eligibility for further inter-collegiate football competition would be destroyed when he signed a professional football contract and received the bonus money. The record is too clear for any misunderstanding that the purpose of secrecy surrounding the execution of the contracts was not to preserve Neely's eligibility, but rather to prevent his ineligibility from becoming known; otherwise there was no need for secrecy. This is illustrated by his later dealings with Dallas which similarly were not publicized, although a $25,000 deposit was made to his credit on the 31st day of December, 1964, thereby permitting him to report that amount as income for the year 1964 in his income tax return. The acceptance of this money ended his eligibility.

The trial court's conclusion that Houston represented to Neely that he would remain eligible if the contracts were kept secret is not supported by the record. As has been stated,

[6] Neely testified: "Q. But you did know that if you took money for playing football that that would make you ineligible to play college football, didn't you? A. Took money, yes sir."

In regard to the acceptance of expense money for the trip to Houston, which is also a violation of inter-collegiate rules, he testified: "Q. Isn't it true, Ralph, that you well knew that any time your expenses were paid by a professional football team, that made you ineligible to play football? A. I suspected it, but I didn't know."

it is apparent that Neely knew his eligibility was lost the instant he completed the Houston transaction and took the bonus money. Furthermore, the only claimed violation of the secrecy agreement was that Houston filed the contract with the League Commissioner. Nothing issued from the Commissioner's Office occasioned the declaration of ineligibility. The scheme to mislead Neely's school, his coaches, his team, and the Gator Bowl opponents, no doubt would have succeeded but for Neely's own double dealing with Dallas, resulting in his attempt to avoid the Houston contracts. While we do not for a moment condone the ruthless methods employed by professional football teams in their contest for the services of college football players, including the lavish expenditure of money[7], it must be conceded that there is no legal impediment to contracting for the services of athletes at any time, and the above-mentioned conduct, while regrettable, does not furnish athletes with a legal excuse to avoid their contracts for reasons other than the temptations of a more attractive offer. Although there are many dismal indications to the contrary, athletes, amateur or professional, and those connected with athletics, are bound

[7] These methods and their adverse effect upon amateur football players were described by Judge Skelly Wright in Detroit Football Company v. Robinson, 186 F. Supp. 933, 934, where he said:

> "This case is but another round in the sordid fight for football players, a fight which begins before these athletes enter college and follows them through their professional careers. It is a fight characterized by deception, double dealing, campus jumping, secret alumni subsidization, semi-professionalism and professionalism. It is a fight which has produced as part of its harvest this current rash of contract jumping suits. It is a fight which so conditions the minds and hearts of these athletes that one day they can agree to play football for a stated amount for one group, only to repudiate that agreement the following day or whenever a better offer comes along."

by their contracts to the same extent as anyone else, and should not be allowed to repudiate them at their pleasure.

Fraud has been defined in Texas as "the successful employment of cunning, deception, or artifice to circumvent, cheat or defraud another to his injury." *International Life Ins. Co. v. Herbert*, Tex., 334 S.W. 2d 525, 530. This court has said that fraud "is never imputed or presumed and the court should not sustain findings of fraud upon circumstances which at the most create only suspicion." *Davis v. C.I.R.*, 184 F. 2d 86, 87. The draft system in professional football limited Neely's negotiations initially to Baltimore and Houston. His collegiate football record was such that he and his father-in-law could anticipate that his services would be in demand and would command a premium contract. The opportunity presented to Neely would come but once in his lifetime, and it is understandable that the situation would be exploited to the maximum. It was with this background that Neely negotiated with Houston and Baltimore. Neely, a bright young man[8], ably advised by his father-in-law, knew exactly what he wanted. With commendable foresight, he sought not only a favorable contract, but also a business arrangement extending beyond his football days. Houston, through its president, undertook to meet this requirement. Neely, after consulting his wife and father-in-law, and after further discussion with Baltimore, accepted Houston's final proposal, which he characterized as a "fine offer." Unexpectedly Dallas arrived on the scene, and Neely found an-

[8] Neely graduated from the College of Business Administration at the University of Oklahoma with a double major in accounting and finance.

other bidder for his services. He welcomed this new opportunity and apparently plans were set in motion designed to convince him that he could ignore the existing agreements with Houston. The first indication that Houston had of Neely's dissatisfaction with his arrangement was when the contracts were received in the mail on December 31, 1964. Up to that time there had been no publicity, and Neely was in Jacksonville prepared to play in the January 2nd game. Representatives of Houston were there to arrange for the photographing of a simulated contract-signing ceremony immediately after the game. It was Neely, not Houston, who disclosed to his coach the facts which brought about a declaration of his ineligibility. Even then Neely had lost his eligibility through his transactions with Dallas. There is insufficent evidence to sustain a finding of material misrepresentation on the part of Houston amounting to fraud which would affect the validity of the contracts. It is true that Neely testified that it was his understanding that the contracts were not to become effective until after the game on January 2nd. The contracts, however, provided otherwise, and we are not at liberty to rewrite them. Furthermore, the letter of employment, the filling station arrangement, and the $25,000 bonus check which was delivered upon the execution of the contracts, were all dated December 1, 1964.

The trial court, in denying the relief sought, apparently applied the equitable maxim that "he who comes into equity must come with clean hands." This doctrine, fundamental in equity jurisprudence, means that equity will not in any manner aid a party whose conduct in relation to the litiga-

tion matter has been unlawful, unconscionable, or inequitable. See, Garland v. Brown, Tex., 52 F. Supp. 401. But the doctrine does not exclude all wrongdoers from a court of equity nor should it be applied in every case where the conduct of a party may be considered unconscionable or inequitable. Action must be such as "affects the equitable relations between the parties." Office Employees Internat'l Union v. Houston Lighting & P. Co., Tex., 314 S.W. 2d 315; Kirkland v. Handrick, Tex., 173 S.W. 2d 735. The maxim admits of the free exercise of judicial discretion in the furtherance of justice. See, Johnson v. Yellow Cab Co., 321 U.S. 383. While it is not contended here that Houston did not have a legal right to sign Neely to a professional player's contract, it is urged that when Houston participated in a scheme to conceal that fact for the purpose of permitting an ineligible player to participate in a post-season game, it was such deceit upon others that a court of equity should not intervene to assist in the enforcement of the contract. With this argument we cannot agree. It is neither unlawful nor inequitable for college football players to surrender their amateur status and turn professional at any time. But what of the attempt at concealment from school, players, public. Neely was free to bind himself to such a contract on December 1, 1964 as he would have been after January 2, 1965. Nor was Houston under any legal duty to publicize the contract or to keep it secret. (Its agreement to keep secret that which it had a legal right to keep secret cannot be considered inequitable or unconscionable as those terms are ordinarily used in contract negotiations.) Neely relies on the case of New York Football Giants v. Los Angeles Chargers F. Club,

Inc., 5 Cir., 291 F. 2d 471, where, in a somewhat similar situation, the court applied the clean hands doctrine. It is quite apparent that the player contract in that case was acquired under circumstances much different from those in this case, but if the rule announced in that case was intended to apply to every instance in which a contract is entered into with a college football player before a post-season game with an understanding that it be kept secret to permit that player to compete in the game, then we must respectfully disagree with the conclusion.

The trial court held that the service station agreement violated the Texas Statute of Frauds, Art. 3995, Revised Civil Statutes of Texas, as amended; Vernon's Anno. Texas Statutes Art. 3995, in that it is vague, indefinite, uncertain and unenforceable. The letter agreement specifically provides that the service station will be for the sale and distribution of Phillips '66 products and that Ada Oil Company will arrange for the construction of a "conventional Phillips '66 Service Station of either Series ER 2000, ARS 201 or DRS 201", and be financed according to the plan selected. It is clear from the unqualified language of the instrument that the station site, the type of station, and the financing hereof is to be determined by Ada Oil Company within the limits specified, without the necessity of further agreement. Such writing satisfies the Texas Statute of Frauds. Tiller v. Fields, Tex., 301 S.W. 2d 185.

REVERSED and REMANDED with instructions to grant the injunction.

APPENDIX D

D-1

NEW YORK FOOTBALL GIANTS, INC.,
Appellant.

v.

LOS ANGELES CHARGERS FOOTBALL CLUB, INC., and Charles Flowers,
Appellees.

No. 18591

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

June 14, 1961

Joel T. Camche, J. Howard Carter, New York City, James Hugh Ray, Tupelo, Miss. (Lumpkin, Holland & Ray, Tupelo, Miss., Townley, Updike, Carter & Rodgers, New York City, of counsel), for appellant.

James McClure, Herbert M. Fant, Sardis, Miss., Lester G. Fant, Jr., Holly Springs, Miss. (McClure, Fant & McClure, Sardis, Miss., of counsel, for Los Angeles Chargers Football Club, Inc.; R. P. Crutcher, Jr., Holly Springs, Miss., of counsel, for Charles Flowers) for appellees.

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and DE VANE, District Judge.

TUTTLE, Chief Judge.

In the case of Detroit Football Company v. Robinson, 186 F. Supp. 933, 934, Judge Wright, of the District Court for the Eastern District of Louisiana said:

> "This case is but another round in the sordid fight for football players, a fight which begins before these athletes enter college and follows them through their professional careers. It is a fight characterized by deception, double dealing, campus jumping, secret alumni subsidization, semi-professionalism and professionalism. It is a fight which has produced as part of its harvest this current rash of contract jumping suits. It is a fight which so conditions the minds and hearts of these athletes that one day they can agree to play football for a stated amount for one group, only to repudiate that agreement the following day or whenever a better offer comes along. So it was with Johnny Robinson."

We have read cases cited in Judge Wright's opinion and we share his disgust at the sordid picture too often presented in this kind of litigation. So much so, in fact, that we conclude that in an appropriate case the federal equity court, which is the tribunal usually appealed to for a decree of specific performance or injunction, must decline to lend its aid to either party to a transaction that in its inception offends concepts of decency and honest dealing, such as the case before us.

In the fall of 1959 Flowers was an outstanding football player on the University of Mississippi team. His team was to play a post-season game on January 1, 1960, at the Sugar Bowl in New Orleans against a traditional rival, Louisiana State University.

The well understood rules of the Southeastern Conference (SEC) and the National Collegiate Athletic Association

(NCAA)[1] made ineligible from further participation in intercollegiate games any player who had signed a contract to play with a professional team. Flowers wanted above all else to play in the Sugar Bowl game. On a trip to New York City for other purposes he was invited by the Giants' official Mara to come to his office where he was urged to sign a contract to play two seasons, beginning in 1960, with the Giants. He told Mara he wanted to retain his eligibility to play in the Sugar Bowl game. The manner in which this was made clear to Mara and the device by which Mara persuaded Flowers to sign the contract and deceive his coach, the University and the opposing team, as well as the college football public, can most satisfactorily be expressed by quoting Mara's own testimony on cross-examination:

> "Q. Prior to the signing of any instrument in your office between you and Charles Flowers, Flowers made it clear to you, didn't he, that the University of Mississippi Football Team had been invited to play in the Sugar Bowl Game on January 1st in New Orleans. You knew that?
>
> "A. Yes, sir.
>
> "Q. Didn't he make it clear to you prior to the signing of the contract, or paper, in your office on December 1st, he did not want to do anything that would destroy his eligibility as a player in that game?
>
> "A. We discussed that earlier.

[1] SEC Constitution and By-Laws, 1959, Rule VIII:

"Professionalism.

Any student who signs a contract or enters into any agreement, explicit or implicit with a professional team * * * shall not be eligible for intercollegiate athletics."

NCAA Constitution, 1958-1959, Article III:

'Principle of Amateurism. * * * One who takes or has taken pay, or has accepted the promise of pay, in any form, for participation in athletics * * * does not meet [the] definition of an amateur."

"Q. Did he make that crystal clear he did not want to do anything, or sign any paper in your office on December 1st, that would destroy his eligibility as a player in that game?

"A. I certainly understood that. Yes, sir.

"Q. He made it crystal clear to you that was his attitude about it, wasn't it?

"A. I knew that was his attitude.

"Q. In order for you to have a binding contract with Mr. Flowers in the paper that was signed and exhibited here as #3 to your testimony, and allow him to play in the Sugar Bowl Game, what proposal did you make to Mr. Flowers as to how he could sign the paper and play in the game?

"A. That the signing of the contract would be kept confidential.

"Q. Kept confidential. So your proposal was that he could sign the paper and play in the game and you would keep it a secret. Is that correct?

"A. That is correct.

"Q. Why did you want to keep it a secret?

"A. I knew if it were revealed, that Flowers would not be permitted to play in the Sugar Bowl Game.

"Q. You knew Coach Vaught, the Head Coach at Ole Miss?

"A. Yes, sir.

"Q. You had known him a number of years?

"A. I first met him in '58, I believe.

"Q. You knew that if Coach Vaught knew this young man, Flowers, had signed a contract in your office on December 1st, obligating his service to your team, Coach Vaught would not have allowed him to play in that Sugar Bowl Game, didn't you?

"A. That was my feeling.

"Q. That was your feeling. That was one reason you wanted to keep the matter a secret, wasn't it?

"A. That's correct."

Following such proposal by Mara, Flowers signed the standard form of contract of the National Football League, and received checks totaling $3500 as a sign-on bonus, and then returned to Mississippi. One of the terms of the contract was that: "This agreement shall become valid and binding upon each party hereto only when, as and if it shall be approved by the Commissioner." Part of the deceit agreed to between the parties was an agreement that Mara would not submit the contract to the Commissioner until after January 1st. Flowers later made some effort by telephone on or about December 5th to withdraw from the contract. Thereafter, the Giants promptly filed the contract with the Commissioner, and he "approved" it on December 15th. However, at Mara's request, he withheld announcement of his approval until after January 1st. On December 29th Flowers had negotiations with the Los Angeles Chargers, as a result of which he was offered a better contract, but which was not formally executed until after the Sugar Bowl game on January 1st. He wrote a letter to the Giant on December 29th stating that he was withdrawing from his agreement with them. He returned the uncashed checks for the bonus money. Flowers played in the game, all of his fans presumably thinking that he was still an eligible player, thanks to the deception proposed by the Giants and entered into by him.

The trial court held that until the "contract" was approved by the Commissioner it was not binding. See Detroit

Football Co. v. Robinson, supra; Los Angeles Rams Football Club v. Cannon, D.C., 185 F. Supp. 717, and Chicago Cardinals Football Club, Inc. v. Etcheverry, No. 3186 Civil, D.C.N.M. It held, therefore, that when Mara, contrary to his agreement not to submit the contract to the Commissioner until after January 1st, did so, the approval by the Commissioner was not effective to make it binding and that Flowers still had the legal right to cancel until January 1st. The trial court, therefore, entered judgment for both defendants.

Without considering the legal issues on the merits, we affirm the judgment of the trial court. We do so by application of the age-old, but sometimes overlooked, doctrine that "he who comes into equity must come with clean hands." A recent discussion of this maximum by the United States Supreme Court is controlling here:

> "The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' Bein v. Heath, 6 How. 228, 247 [12 L. Ed. 416]. Thus while 'equity does not demand that its suitors shall have led blameless lives, Loughran v. Loughran, 292 U.S. 216, 229 [54 S. Ct. 684, 689, 78 L. Ed. 1219], as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 [54 S. Ct. 146,

147, 78 L. Ed 293]; Johnson v. Yellow Cab [Transit] Co., 321 U.S. 383, 387 [64 S. Ct. 622, 624, 88 L. Ed 814]; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 379-399.

"This maximum necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' Keystone Driller Co. v. General Excavator Co. supra, [290 U.S. 240] 245, 256 [54 S. Ct. 146, 147, 148, 78 L. Ed. 293]. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

"Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See Morton Salt Co. v. [G. S.] Suppiger Co., 314 U.S. 488, 492-494 [62 S. Ct. 402, 405, 406, 86 L. Ed. 363]." Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814, 815, 65 S. Ct. 993, 997, 998, 89 L. Ed. 1381.

Earlier the Supreme Court said in Deweese v. Reinhard, 165 U.S. 386, 390, 17 S. Ct. 340, 341, 41 L. Ed. 757:

"* * * A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

Here the plaintiff's whole difficulty arises because it admittedly took from Flowers what it claims to be a binding contract, but which it agreed with Flowers it would, in effect, represent was not in existence in order to deceive others who had a very material and important interest in the subject matter. If there had been a straightforward execution of the document, followed by its filing with the Commissioner, none of the legal problems now present to this court to untangle would exist. We think no party has the right thus to create problems by its devious and deceitful conduct and then approach a court of equity with a plea that the pretended status which it has foisted on the public be ignored and its rights be declared as if it had acted in good faith throughout.

When it became apparent from uncontradicted testimony of Mara that this deceit was practiced in order to bring into being the "contract" sued upon, the trial court should have dismissed the suit without more on the basis of the "clean hands" doctrine.

To the extent that the final judgment of the trial court dismissed the complaint as amended, with costs adjudged against the plaintiff, the said judgment is affirmed. To the extent that the judgment proceeded to a legal determination as to the validity of the contracts between the parties, we conclude that, in the view we take of the equitable principles applicable, these judgments should not have been reached. The judgment of the trial court is, therefore, modified by striking therefrom paragraphs B and C of Section 5 of the said judgment.

As thus modified the judgment is affirmed.

APPENDIX E

New Pro Grid League Due in 1967

The Dallas Morning News
Thursday, June 30, 1966
Sports **** Financial 1B

A well financed professional football league, with a Dallasite figuring prominently in the planning, was announced Wednesday in Chicago by former Notre Dame football coach Frank Leahy.

Leahy, who will serve as chairman of the founding corporation with the complete power normally accorded a league commissioner, said that the group would be called the United States Football League and will have 12 major cities in membership for a proposed start in 1967.

Included in the seven man corporation heading the league is Chester L. Brewer, a Dallas insurance, oil and banking investor. He is a former football player at the University of Missouri and son of a former Michigan State head football coach.

BREWER, who was in Chicago for the announcement of the new league, said after his return here late Wednesday that a "lawyer friend in Washington" was instrumental in his getting in on the league ground floor.

"He (the lawyer) knew my interest in football as a former official and player and he introduced me to some people connnected with the league," said Brewer.

While Leahy will head the corporation, Brewer said that Norman F. Hecht of Rockville, Md., a banker, was the league "ramrod" in the beginning.

HECHT, new president of the corporation, apparently became interested in a new league after the merger of the American and National football leagues and contacted other parties across the nation.

Brewer said he was first contacted "about three weeks ago" on the idea of forming a league and took up the offer because "I definitely feel there should be two professional football leagues."

Leahy said the first six cities to get league franchises would be named July 20, the next three Aug. 15 and the last three Sept. 1.

No mention of where the league franchises would be awarded was announced and Brewer refused to speculate on whether Dallas would receive one.

"I HAVE heard no mention of any city, including Dallas," he said, "but like all major cities in America, Dallas is being considered."

It was reported that the league has 13 applications, five from cities with either an NFL or AFL team already in them.

Brewer was also appointed as athletic director. "Meaning I'll be in charge of player activity," he said.

The new league will start signing players in November and Leahy said, "We'll go after everyone. We have a program that certainly will encourage them."

Asked if this would mean a signing war with the two established pro circuits, vice-president Bruce A. Werlhof said:

OUR SEVEN incorporators have a great deal of money, and I would say that we are equipped to pay anything we want to get anyone we want."

Leahy said there would be a common player draft which would be based on a central scouting system and that within the next week headquarters would be established in New York City.

Among unique features of the league were that players and coaches will have rights to acquire shares of stock in the team organization in which they play; eligibility for retirement of players will occur much sooner than in the existing leagues; each of the 12 teams will have one president who will be on the board of directors.

THIS BOARD will set policy regarding business matters; and the league also will have a board of coaches which will make the schedules and handle the central annual draft.

Leahy said that the league would go after the best players, "even if it meant reaching the $400,000 or $500,000 bracket for a player we want.

"I think the people of the NFL and the AFL are too sportsminded to try to circumvent our emergence as a new league," he continued, "and I don't see any reason for them to do so, and I don't see how they could anyway.

"Naturally we think there is room for another league, and there certainly is room for it's television potential."

WERLHOF said that the corporation is prepared to spend $24,000,000 in its first year draft of players under a technical program in which part of this sum would go toward the cost of a franchise.

A man with first hand information on forming new leagues, Lamar Hunt, said Wednesday in Dallas after told about the purposed USFL:

"It's news to me. I guess pro football is a growing sport, or so it sounds like. I think you can succeed in any venture in this country if you go into it from a good business approach. The AFL proved there was room for two leagues.

"OF COURSE times and conditions change. The economics of the game are much different than they were six years ago."

Hunt said Leahy (a short-time general manager of the Chargers when the team still operated in Los Angeles) and Werlhof were familiar names. They met with him about three months ago and expressed an interest in an Anaheim, (Calif.) franchise in the AFL.

New Pro League Talks Big Money

By STEVE PERKINS

Hold onto your hats, boys, here we go again.

The formation of a third pro football league was announced yesterday by Frank Leahy plus six men with money—and they are not kidding.

One of the original incorporators is Dallas investor-insurance man Chester L. Brewer, 2212 Custer Road. "America is big enough for another pro football league," Brewer said Thursday. "Plenty of good college players are turned away from training camp by the pro teams every year. A lot of them wind up in Canada."

The league, incorporated in Delaware as the United States Football League, will have ex-Notre Dame coach Frank Leahy as chairman of the board, and proposes to field 12 teams for action in 1967.

LEAHY SAID IN Chicago that four of the cities already awarded teams are Anaheim, Cincinnati, Washington and Philadelphia.

The United Press said the origin of the league was the disappointment of its founders in not getting an Anaheim franchise in the American Football League.

"Leahy was going to be the coach of the Anaheim team," said Brewer. "But the impetus came equally from men in Philadelphia and Washington. Mr. Norman Hecht, the president of a Washington (D.C.) bank, probably had more to do with getting all of this started than anyone."

The new league indicated it is girded for war with the established teams by announcing that each of its 12 clubs would be capitalized at $6.5 million apiece. It will have a kitty of $24 million "to get the players we want," said another of the founders, attorney Bruce Werlhof of Santa Ana, Calif.

LEAHY, WHO WILL function as the league commissioner, with offices in New York City, said: "We are willing and adequately prepared to spend money for outstanding players and can go to half a million dollars to get any of them."

Said Brewer: "That's expected. The other two leagues bid against each other for players. There's no reason not to expect it now. That's part of the game."

Leahy said the first six franchises will be announced July 20, the next three Aug. 15 and the last three Sept. 1. Among other cities considered for the new league are Seattle, Chicago, Memphis, New Orleans and Phoenix.

The new league will hold a common draft in November, Leahy said, as soon as the college season is completed. The AFL-NFL common draft is scheduled for Jan. 15. "I surmise," said Leahy, "they now will change their plans."

HECHT WILL BE PRESIDENT of the league and represent the board in business matters, and Brewer will be athletic director in the same capacity in regard to field matters. "This will not be a fulltime job," Brewer said. "We will hire an executive to handle the details of the league."

Other members of the corporation: Harry Kagen, Washington real estate investor; A. M. Cetrulo, Cincinnati industrial financier; Clayton Faulkner, Haverton, Pa., investment banker.

Brewer, who played football at Missouri, has a long background in the sport. His father, Chester L. Brewer Sr., was head coach at Michigan State 1918-

See FOOTBALL on Page 4

THE DALLAS TIMES HERALD

PART B

SPORTS

CLASSIFIED BUSINESS RADIO-TV

Thursday, June 30, 1966

★FOOTBALL

Continued From Page 1

21 and later athletic director of Missouri. Brewer has lived in Dallas four years. He is a Dallas Cowboy season ticket holder.

BREWER POINTED out a unique asset in the league's bid for personnel. "Players and coaches will be given stock options on the teams they're with. This was a feature suggested by Coach Leahy."

Leahy predicted: "In four or five years we will match the NFL-AFL talent-wise and in competitiveness."

In Chicago, Bear owner-coach George Halas remarked: "I don't know where Leahy has been for the last four or five years, but I guess he's just reaching for a skyhook."

Does all of this sound familiar, sports fans?

FILED
AUG 18 1966
JOHN F. DAVIS, CLERK

No. 407

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

RALPH NEELY, *Petitioner,*

v.

HOUSTON OILERS, INC., *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GUS RINEHART
2320 First National Building
Oklahoma City, Oklahoma

WILLIAM D. DEAKINS, JR.
WILLIAM R. ECKHARDT
2005 First City National Bank Bldg.
Houston, Texas

Attorneys for Respondent

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

INDEX

	Page
OPINIONS IN THE COURTS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6
ARGUMENT OPPOSING GRANTING OF THE WRIT	9
1. The Decision of the Court of Appeals for the Tenth Circuit is Not in Conflict With the Decision of the Court of Appeals for the Fifth Circuit in *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471 (1961)	9
2. The Court of Appeals Correctly Applied Texas Law in Holding that the Service Station Agreement (Plaintiff's Exhibit 7), One of the Contract Documents, Meets the Requirements of the Texas Revised Civil Statute of Frauds, Art. 3995, Texas Revised Civil Statutes.	14
3. Ada Oil Company was Not an Indispensable Party.	18
4. Petitioner Cannot Properly Raise for the First Time in His Petition for Writ of Certiorari an Issue Not Urged in the Courts Below That the Dallas Cowboys Football Team Was an Indispensable Party to this Action.	20
CONCLUSION	21
OPINION OF COURT OF APPEALS, FIFTH CIRCUIT	App. A-1
ARTICLE 3995, TEXAS REVISED CIVIL STATUTES	App. B-1

INDEX TO AUTHORITIES

CASES	Page
Allstate Ins. Co. v. Brown, (Tex.Civ.App. 1956) 289 S.W.2d 300	19
Best Building Co. v. Sikes, (Civ.App., Ft. Worth, 1965) 394 S.W.2d 57, writ ref'd n.r.e.	16
Butler v. Continental Oil Co., (Tex.Civ.App.) 182 S.W.2d 843, 845	19
Dallas Cowboys Football Club, Inc. v. Harris, (Civ.App., Dallas, 1961) 348 S.W.2d 37, 42	17
Detroit Football Co. v. Robinson, 186 F.Supp. 933	11, 12
Eastland County v. Davisson, (Tex.Comm.App. 1929) 13 S.W.2d 676, 276	19
Employers Mutual Liability Co. v. Mosqueda, 317 F.2d 609	19
Green v. American General Ins. Co., (Tex.Civ. App. 1962) 354 S.W.2d 616, writ ref'd n.r.e.	19
Kauffman v. Deignan, (Tex.Civ.App.) 227 S.W. 2d 271, 275	17
Los Angeles Rams Football Club v. Cannon, 185 F.Supp. 717	12
McElroy v. Danciger, (Tex.Civ.App.) 241 S.W. 1098	17
Mission Independent School District v. Diserens, (Sup.Ct. Tex., 1945) 188 S.W.2d 568	17
National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 95 L.Ed. 497	9
New York Football Giants v. Los Angeles Chargers Football Club, Inc., (5th Cir.) 291 F.2d 471	5, 9, 10, 21
Pacific Mutual Life Ins. Co. v. Westglen Park, Inc., (Tex.Sup.Ct. 1959) 325 S.W.2d 113	17
Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 815, 89 L.Ed. 1381	13, 14
Republic Molding Corp. v. B. W. Photo Utilities (C.A. 9) 319 F.2d 347	13
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 99 L.Ed. 897, 75 S.Ct. 614	10

CASES	Page
Shaughnessy v. Pedreiro, 349 U.S. 48, 99 L.Ed. 868, 75 S.Ct. 591	19
Skeeters v. Granger (Tex.Civ.App. 1958) 314 S.W.2d 364, writ ref'd n.r.e.	16
Taylor v. Lester, (Tex.Civ.App.) 12 S.W.2d 1097, writ. ref'd	17
Tiller v. Fields, (Tex.Civ.App. 1957) 301 S.W. 2d 185	16
Williams v. Fanning, 332 U.S. 490, 92 L.Ed. 95, 68 S.Ct. 188	19

STATUTES	
Art. 3995, Tex.Rev. Civ. Stats.	2
T28 Sec. 1254(1) USC	2

TEXTS	
34 Tex.Jur.(2d) 452	19

No. 407

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

RALPH NEELY, *Petitioner,*

v.

HOUSTON OILERS, INC., *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Judges Of The Court:

Respondent HOUSTON OILERS, INC., prays that the Petition for Writ of Certiorari of RALPH NEELY be denied, and would show that the requisite grounds do not exist for review of the Judgment of the United States Court of Appeals for the Tenth Circuit entered May 18, 1966.

OPINIONS IN THE COURTS BELOW

The Opinion of the Court of Appeals is printed in Appendix "A" hereto. The Findings of Fact and Conclu-

sions of Law of the District Court appear in the record. (D.R. 121-136)[1]

JURISDICTION

The Judgment of the Court of Appeals was entered on May 18, 1966. (A.R. 4) Rehearing was denied on June 23, 1966. (A.R. 10)

Petitioner seeks to invoke jurisdiction of this Court under Title 28, U.S.C., Sec. 1254(1). Respondent would however show that there are neither special nor important reasons for review of this cause on writ of certiorari; that no conflict here exists between decisions of Courts of Appeals and that the Court of Appeals correctly applied the Texas law pertaining to the Texas Statute of Frauds, Article 3995, Texas Revised Civil Statutes.

STATUTE INVOLVED

The Texas Statute of Frauds, Article 3995, Texas Revised Civil Statutes is printed in Appendix "B" hereto.

QUESTIONS PRESENTED

1. Did the Court of Appeals abuse its discretionary powers when it refused to apply the equitable "clean hands" doctrine and granted injunctive relief to enforce a contract provision in a case where a professional football team and a college football player, without fraud or deceit, entered

[1] The record is comprised of the Transcript of Record from the Court of Appeals which incorporates the Record and Transcript of the District Court. Each document begins with a page one. References to the various parts of the record will be made as follows: Court of Appeals record—A.R.; District Court Record—D.R.; District Court Transcript—Tr.

into valid written contracts prior to a post-season college game, the parties had an extrinsic oral understanding that the existence of the contract would not be publicized until after the game, and where the college player did not play in the post-season game?

2. Did the Court of Appeals correctly apply Texas law in holding that the service station agreement (Tr. 36, Pl.'s Ex. 7) meets the requirements of the Texas Statute of Frauds, Art. 3995, Texas Revised Civil Statutes, where the instrument is in writing, is signed by the parties, and provides a method of certain and final identification of the property by giving one of the parties the unqualified right of selection without the necessity of further agreement by the other party?

3. Is the issue that Ada Oil Company is an indispensable party a proper one for consideration in acting upon a Petition for Writ of Certiorari where such issue has been raised for the first time on Petition for Rehearing in the Court of Appeals after Respondent has alleged, the Petitioner has admitted, and the Court of Appeals has held, that the contract involved was made by Respondent and Petitioner?

If so, then the question presented is whether or not Ada Oil Company is an indispensable party where it entered into an agreement on which it has secondary or derivative liability and with respect to which Respondent is the real party in interest.

4. Is the issue that the Dallas Cowboys Football team is an indispensable party a proper one for consideration in acting upon a Petition for Writ of Certiorari where such issue is raised for the first time in the Petition for Writ of Certiorari?

If so, then the question presented is whether the Dallas Cowboys Football team is an indispensable party to this action by Respondent seeking a declaratory judgment that a valid contract exists between the Houston Oilers and Ralph Neely and an injunction restraining the violation by Petitioner of a provision of the contract because Petitioner has made a separate and distinct contract with such third party.

STATEMENT OF THE CASE

In this action filed in the United States District Court for the Western District of Oklahoma, Respondent, Houston Oilers, Inc., seeks a declaratory judgment that there exists a valid, enforceable written contract between Respondent and Petitioner, Ralph Neely, that he play professional football for the Houston Oilers team of the American Football League, and an injunction permanently restraining and enjoining Petitioner from playing football with any other team during the term of the contract. (D.R. 1-45)

Jurisdiction of the District Court was based upon diversity of citizenship. Respondent is a Texas corporation. Petitioner was, at the institution of suit, a resident of Oklahoma. (D.R. 109-110)

After a non-jury trial, the District Judge entered judgment that the contract between the parties was invalid and of no force and effect, denied the application for declaratory judgment and for injunction, and dismissed the Complaint with prejudice. (D.R. 136)

Respondent perfected an appeal to the Court of Appeals for the Tenth Circuit. The Court of Appeals held that the undisputed facts in the record disclosed a valid and

enforceable contract (A.R. 3 p. 3); that there is insufficient evidence to sustain a finding of material misrepresentation on the part of Houston amounting to fraud which would affect the validity of the contracts (A.R. 3 p. 12); that the Standard Players' Contracts, the Letter Agreement for Additional Employment, and the Filling Station Agreement constituted a single transaction (A.R. 3 p. 5); that the maxim (clean hands doctrine) admits of the free exercise of judicial discretion in the furtherance of justice (A.R. 3 p. 13); that it is neither unlawful nor inequitable for college football players to surrender their amateur status and turn professional at any time (A.R. 3 p. 13); that Houston was under no legal duty to publicize the contract or to keep it secret (A.R. 3 p. 13); that the Player Contract in *New York Football Giants v. Los Angeles Chargers Football Club, Inc.*, (5th Cir.) 291 F.2d 471, was acquired under circumstances much different from those in this case, (A.R. 3 p. 13) and that the service station agreement is a writing which satisfies the Texas Statute of Frauds, (A.R. 3 p. 14)

The Court of Appeals reversed and remanded with instructions to grant the injunction. (A.R. 3 p. 4)

Petitioner, for the first time while his Motion for Rehearing was pending in the Court of Appeals, by motion, (A.R. 5) made the contention that Ada Oil Company was an indispensable party. The Court of Appeals having already held on the undisputed record that the contract, including the service station agreement was between Respondent and Petitioner, such Motion was overruled. (A.R. 3 p. 10) Petitioner, for the first time in the Petition for writ of certiorari has raised the contention that the Dallas Cowboys Football Club is an indispensable party to this action.

On Motion of Petitioner, the mandate of the Court of Appeals has been stayed until final disposition by this Court.

STATEMENT OF FACTS

Respondent owns and operates a professional football team known as the Houston Oilers which is a member of the American Football League. Petitioner, Ralph Neely, on December 1, 1964 was a student at the University of Oklahoma and a member of the Oklahoma University football team (D.R. 109-110) which team was scheduled to play in the Gator Bowl game on January 2, 1965. (D.R. 112) Under the provisions of the American Football League Constitution and By-Laws, (AFL Constitution and By-Laws, VIII, Section 10, Pl.Ex. 9, D.R. 113) Ralph Neely became eligible to be selected and placed under contract by a member team of the American Football League at the time of the American Football League draft held on November 28, 1964. Ralph Neely was selected by the Houston Oilers as one of its draft choices. He was also selected by the Baltimore Colts in the National Football League draft held the same day.

Ralph Neely and his father-in-law, Robert A. Forte, travelled to Houston, Texas, where they met with K. S. Adams, Jr. and Carroll Martin of the Houston Oilers on November 30, 1964, and again on December 1, 1964 to discuss the terms under which Ralph Neely would agree to play professional football for the Houston Oilers. (Tr. 47, 52)

Under the undisputed testimony at the time of the contract discussions, Ralph Neely for tax reasons desired to obtain his $25,000 players' bonus in 1964 so that the

amount of the bonus could be included in his 1964 income. (Tr. 23, 49, 89, 205) Neely knew that if he took money for playing football it would make him ineligible to play college football. (Tr. 198) Neely was told by Mr. Adams that if he wanted his bonus money in 1964 he would have to sign a contract. (Tr. 91)

On December 1, 1964, Ralph Neely, K. S. Adams, Jr., (President and sole stockholder of both Houston Oilers, Inc. and Ada Oil Company) and Carroll Martin executed the Houston contract documents. (Pl. Ex. 1-7, Def. Ex. 1-5, D.R. 170-194, 214-234) The Standard American League Football contract forms executed by the parties provided in part:

> "1. The term of this contract shall be from the date of the execution hereof until the first day of May following the close of the football season commencing . . .
>
> "18. Upon its execution this contract shall be valid and binding immediately upon the parties hereto. A copy of this contract shall be filed by the Club with the Commissioner within ten (10) days after execution . . ."

Ralph Neely received a copy of each of the Houston contract documents, together with the Houston bonus money check. (Pl.Ex. 8, D.R. 111, Tr. 60)

A copy of each of the American Football League Standard Players' Contract forms, with attachments, signed by Neely was submitted by the Houston Oilers to the American Football League Commissioner on December 9, 1964, pursuant to the contract provision that "a copy of this contract shall be filed by the Club with the Commissioner within ten days after execution." The Commis-

sioner took no action to disapprove or to terminate the contract. (Tr. 124, 128; depositions of Woodard and Foss)

For a considerable period of time after he made the arrangement with Houston, Neely admittedly was completely satisfied with it and intended to play football for Houston. (Tr. 194) Dallas somehow obtained Neely's National Football League draft rights from Baltimore. Neely was contacted time and again by representatives of the Dallas Cowboys football team of the National Football League and was told by them that his contract with Houston was invalid. (Tr. 230, Joe Brandt deposition, p. 20)

On December 29, 1964, Ralph Neely signed and caused to be mailed the letters. (Def.Ex. 6-7, D.R. 240-242) On the same date Robert A. Forte signed and mailed a letter (Def.Ex. 8, D.R. 243) returning the Houston bonus check. (Pl.Ex. 8, D.R. 195)

Neely received the $25,000 Dallas Cowboy bonus check on December 31, 1964, prior to the time he was declared ineligible to play in the Gator Bowl football game. He reported the $25,000 as 1964 income. (Tr. 161, 174-175) Neely himself told the Oklahoma University coach that he had signed the Houston contract papers and had sent the letters dated December 29, 1964. (Tr. 200-202) On January 1, 1965, Neely was declared ineligible to play in the Gator Bowl game. (Tr. 162)

On January 1, 1965, Neely signed contracts to play professional football with the Dallas Cowboys of the National Football League during the football seasons commencing in the years 1965 through 1968. He, in fact played with the Dallas team during the 1965 season and admits that he will continue to play football for Dallas unless he is

enjoined from so doing. It is stipulated that Neely possesses special, exceptional, unique knowledge, skill and ability as a football player. (D.R. 111)

ARGUMENT OPPOSING GRANTING OF THE WRIT

1. The Decision of the Court of Appeals for the Tenth Circuit is Not in Conflict With the Decision of the Court of Appeals For The Fifth Circuit in New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (1961).

The considerations governing review on certiorari, now set out in Rule 19 of the Supreme Court Rules, make it clear that a review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

This Court has said in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498 at page 502, 95 L.Ed. 497, 482, that:

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422."

A similar holding was made in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79, 99 L.Ed. 897, 904, 75 S.Ct. 614.

For the requisite real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal to exist, the conflict must be well defined. An apparent inconsistency in the principles announced, or in the application of recognized principles is not sufficient. The rulings must be so for upon the same state of facts that the decision of one case should be necessarily conclusive of the decision in the other.

The opinion of the Courts of Appeal for the Tenth Circuit in the instant case and that of the Fifth Circuit in the case of *New York Football Giants v. Los Angeles Chargers Football Club, Inc.*, (C.A. 5) 291 F.2d 471, reveal that the two cases are plainly distinguishable on the facts.

In *New York Football Giants v. Los Angeles Chargers, supra,* the evidence supported the trial court's findings of fraud in the inducement of the contract. The testimony of Mora, owner of the New York Football Giants, undisputedly showed that he had made material misrepresentations to Flowers, the college player there involved. The Court of Appeals for the Fifth Circuit said (291 F.2d at page 474):

> "If there had been a straightforward execution of the document, followed by its filing with the Commissioner, none of the legal problems now presented to this Court to untangle would exist . . . .
>
> "When it became apparent from the uncontradicted testimony of Mora that this deceit was practiced in order to bring into being the 'contract' sued upon,

> the trial court should have dismissed the suit without more on the basis of the 'clean hands doctrine.' "

Thus it is clear that what the Fifth Circuit did was to invoke the "clean hands" doctrine to deny injunctive relief where there was evidence of fraud which affected equitable relations existing between the parties.

To the contrary, the Court of Appeals for the Tenth Circuit found that there was insufficient evidence to sustain a finding of material misrepresentation on the part of Houston amounting to fraud which would affect the validity of the contracts. (A.R. 3, p. 12) There was no fraud in the inducement of the contract in the instant case because Neely was not deceived. He demanded and got his bonus in 1964. As stated by the Court of Appeals in its Opinion:

> "Any rational consideration of the evidence leads to the conclusion that all the parties knew that if Neely signed a professional football contract and received money therefor . . . he would consequently become ineligible to compete in the post-season games." (A.R. 3, p. 5)

Also there is an important, basic difference in the contract involved in the *Flowers* case and the contract in the *Neely* case. One of the terms of the Flowers' contract (291 F.2d 471, 473) was that:

> "This agreement shall become valid and binding upon each party hereto only when, as, and if it shall be approved by the Commissioner."

This important contract difference was the basis for the decisions in *Detroit Football Co. v. Robinson,* 186 F.Supp.

933 and *Los Angeles Rams Football Club v. Cannon,* 185 F.Supp. 717. In the instant case, as stated by the Court of Appeals (A.R. 3, p. 6):

> ". . . The contracts provide in plain language that they shall be valid and binding immediately upon execution and that a copy shall be filed with the League Commissioner within ten days thereafter."

At the time he signed the contract documents, Neely asked that the signing not be made public, and was told that the signing would not be publicized until after the Gator Bowl football game. (Tr. 156, 257, 273) *This verbal assurance is not a part of the written contract which Respondent seeks to enforce.*

It is neither unlawful nor unethical for an amateur athlete to turn professional at any time he desires to do so. The only question of ethics arose with respect to Neely's conduct after he had signed the contracts. From the standpoint of the Houston Oilers, their actions, so far as the American Football League was concerned, were governed by the League's Constitution and By-Laws under which Neely was eligible to be signed to a player's contract.

We respectfully submit that the Court of Appeals correctly held that the Houston Oilers were under no duty to publicize the signing of the contract and that it was perfectly proper for Respondent to remain silent.

Regardless of what his intentions originally were, Neely did not play in the post-season game. Prior to the game he disclosed to his coach the facts which brought about a declaration of his ineligibility. (A.R. 3, p. 12; Tr. 200-202)

An important distinction between the two cases with respect to the applicability of the "clean hands" doctrine is that Flowers, the player involved in *Giants v. Chargers, supra,* played in the Bowl game, whereas in the instant case Neely did not play in the game. Consequently there was no actual deception of the Oklahoma football team or of the public generally. The claimed inequitable action was not committed, but only discussed. Compare *Republic Molding Corp. v. B. W. Photo Utilities,* (C.A. 9) 319 F.2d 347, 350.

The opinions of the Courts of Appeal can be readily reconciled on the facts, therefore the requisite real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal does not exist and the petition should be denied. The Court of Appeals' decision is consistent with the pronouncements of this Court applying the equitable "clean hands" doctrine. Petitioner does not even assert that a conflict exists with prior decisions of this Court.

This case merely involves the application of well-recognized, established legal principles to the particular facts. It is not a case involving principles, the settlement of which is of importance to the public as distinguished from that of the parties. The Court of Appeals merely exercised its broad discretionary powers. As stated by the Court (A.R. 3, p. 13):

> "The maxim admits of the free exercise of judicial discretion in the furtherance of justice."

In the language of this Honorable Court in *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815, 89 L.Ed. 1381, 1386:

> "This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' Keystone Driller Co. v. General Excavator Co. supra (290 U.S. 245, 246, 78 L.Ed. 296, 297, 54 S.Ct. 146)."

The refusal of the Court of Appeals for the Tenth Circuit to apply the "clean hands" doctrine in a case which it found from the evidence did not involve fraud or deceit on the part of the Respondent does not conflict with the decision of the Court of Appeals for the Fifth Circuit which applied the "clean hands" doctrine to deny relief in a case where the Court found the evidence supported fraud in the inducement of the contract.

2. The Court of Appeals Correctly Applied Texas Law in Holding that the Service Station Agreement (Pl. Ex. 7), One of the Contract Documents, Meets the Requirements of the Texas Statute of Frauds, Art. 3995, Texas Revised Civil Statutes.

The decision of the Court of Appeals is not in conflict with the applicable law of the State of Texas.

On December 1, 1964 as a part of a single transaction (Tr. 113, A.R. 3, p. 5) Petitioner, Ralph Neely, executed the Houston contract documents consisting of the Standard American Football League contract forms and the Service Station Agreement. (Pl. Ex. 7, D.R. 110-111) K. S. Adams, Jr. who signed the Service Station Agreement along with Neely, in addition to being the president and owner of all of the capital stock of the Houston

Oilers, Inc., also was the owner of Ada Oil Company and had authority to make this agreement with Neely as a part of the consideration to get him to play football for the Houston Oilers. (Tr. 115)

This Letter Agreement is in writing and is signed by the parties. It therefore complies with the Texas statute of frauds unless it is held that the agreement as a written memorandum, is not a sufficient writing to comply with the statute. Such is not the case.

The agreement states in plain language that Ada Oil Company is to purchase a suitable service station site in Harris County, Texas, to be used for the sale of Phillips '66 products at a cost of from $30,000 to $60,000, and is to arrange for the financing and construction thereon of a service station of a designated type. Ada Oil Company under the Letter Agreement is to also, upon the completion of the construction of the service station, to enter into the standard two-party lease agreements with Phillips Petroleum Company and to procure a loan in an amount equal to the total cost of the service station site and improvements, the amount of which loan is to be paid in two hundred and forty equal monthly installments under the leases.

The parties did not purport to contract with respect to a particular tract of property. However, *because it is clear from the unqualified language of the instrument that the service station site, the type of station, and the financing thereof is to be determined by Ada Oil Company, within the limits specified, and without the necessity of any further agreement on the part of Ralph Neely, the writing satisfies the Texas Statute of Frauds.*

The requirements of the Texas Statute of Frauds are satisfied whenever the contract provides a method of certain and final identification of the property.

Directly in point is the case of *Tiller v. Fields*, (Tex.Civ. App. 1957) 301 S.W.2d 185 wherein the court said at page 190:

> "Appellants in their brief cite the case of Stekoll Petroleum Co. v. Hamilton, 152 Tex. 182, 255 S.W.2d 187. We think a careful analysis of this case will show that it is supportive of appellees' position rather than that of appellants' because it is clearly recognized in the Stekoll case that the statute of frauds is met where the contract, instrument or agreement, gives either party the unqualified right or power to make a selection or determination of the details without the necessity of further agreement or approval of the other party. Also in this connection see Taylor v. Lester, Tex.Civ.App., 12 S.W.2d 1097, wr.ref.; Gray v. Producers' Oil Co., Tex.Civ.App., 227 S.W. 240; Rountree v. Bridwell, Tex.Civ.App., 269 S.W.2d 824, wr.ref., N.R.E.; Lingeman v. Shirk, 15 Ind.App. 432, 43 N.E. 33; Peckham v. Lane, 81 Kan. 489, 106 P. 464, 25 L.R.A., N.S., 967. The lease pooling provision in question in this case clearly gives the lessee the broad and unqualified power to select or determine the lands (in the immediate vicinity) to be placed in the unit . . ."

Other cases which directly support Respondent's position that the writing in question meets the requirements of the Texas Statute of Frauds are *Skeeters v. Granger*, (Tex. Civ.App. 1958) 314 S.W.2d 364, 366, writ ref'd n.r.e., and *Best Building Company v. Sikes*, (Tex.Civ.App. 1965) 394 S.W.2d 57, 62, writ ref'd n.r.e.

Under Texas law, an express or implied reference in one document to another incorporates the latter into the former

so as to allow the two to be considered together in determining whether the statute of frauds has been complied with. *McElroy v. Danciger,* (Tex.Civ.App.) 241 S.W. 1098; *Taylor v. Lester,* (Tex.Civ.App.) 12 S.W.2d 1097, writ ref'd; *Kauffman v. Deignan,* (Tex.Civ.App.) 227 S.W.2d 271, 275. Therefore, the agreement is not made invalid because it incorporates by reference the instruments which describe the improvements to be erected upon the property, and the Phillips Petroleum Company's standard Two-Party Lease Agreements.

The Phillips Petroleum Company's Standard Lease Agreements or existing lease agreements used at Phillips service stations all over the country. (Tr. 119) The service station leases are to be between Ada Oil Company and Phillips Petroleum Co. The Service Station Agreement (Pl. Ex. 7, D.R. 36) requires that the lease rentals pay the full cost of the service station site and improvements. Therefore, the other provisions of the lease agreements are of no concern to Neely and he is not required, under Texas law, to approve their terms. *Pacific Mutual Life Ins. Co. v. Westglen Park, Inc.,* (Tex.Sup.Ct. 1959) 325 S.W.2d 113.

Petitioner's argument concerning the effect of the judgment below, if allowed to stand, borders on the ridiculous. The well-established Texas law, concerning which there is no dispute is that injunctive relief will be granted to restrain a violation by Neely of his covenant not to play football for a club other than the Houston Oilers, but that he cannot be required by mandatory injunction to play for Houston. *Mission Independent School District v. Diserens,* (Sup.Ct. of Tex., 1945) 188 S.W.2d 568; *Dallas Cowboys Football Club, Inc. v. Harris,* (Civ.App. Dallas, 1961) 348 S.W.2d 37, 42. Should Neely elect to play foot-

ball for Houston, then the service station site is obviously a valuable part of the consideration for his playing football, probably worth under Neely's own testimony at least $100,000 by the end of twenty years. (Tr. 281) Neely has made and is bound by his contract. This Court will not presume that Respondent, in the future, will not deal fairly with the Petitioner. However, Neely would not be compelled to accept a conveyance of a service station site if he chose for any reason not to accept it.

3. Ada Oil Company Was Not an Indispensable Party.

Respondent plead (D.R. 2), Petitioner admitted, (D.R. 61), and the Court of Appeals found (A.R. 3, p. 5) that the contract and agreement *between Houston Oilers, Inc. and Ralph Neely* consisted of seven instructions; i.e., the bonus clause, four American Football League contracts, the Real Estate Salesman Commission Agreement, and the Service Station Site Agreement *which constituted a single offer in writing made by the Houston Oilers and accepted by Ralph Neely.* The sole consideration from Neely for the conveyance to him of the station site was his agreement to play football for Houston. (Tr. 49-50) Although Ada Oil Company appears as a party to the service station agreement, examination of all the contract documents and the evidence makes it obvious that Respondent, Houston Oilers, is the real party in interest and that Ada, an affiliated corporation owned 100% by K. S. Adams, Jr. was named in the Letter Agreement to act for the Houston Oilers merely because that company was the jobber for Phillips '66 products in the Harris County area and was in a convenient position to carry out what was

in fact the primary obligation of the Houston Oilers; namely, to pay Neely that part of the consideration for playing football represented by the service station site.

Under Texas law whether it be considered that under the circumstances there is an identity of parties between the Houston Oilers and Ada Oil Company, that Houston Oilers stand in the position of a guarantor of the performance by Ada, or whether Ada is to act as an agent of Respondent, the requisite relationship exists so that Ada is bound under the doctrine of res judicata by the decision of the Court of Appeals.

The law is well-established in Texas that a plea of res judicata based upon a former suit is available against one not a party to the former suit who rests under a secondary or derivative liability which must have been considered and determined in the former litigation. *Eastland County v. Davisson,* (Tex.Comm.App. 1929) 13 S.W.2d 673, 676; *Butler v. Continental Oil Co.,* (Tex.Civ.App.) 182 S.W.2d 843, 845; *Green v. American General Ins. Co.,* (Tex.Civ. App. 1962) 354 S.W.2d 616, writ ref'd n.r.e.; Cf. *Employers Mutual Liability Co. v. Mosqueda,* 317 F.2d 609; see also, *Allstate Ins. Co. v. Brown,* (Tex.Civ.App. 1956) 289 S.W.2d 300; 34 Tex.Jur.2d 452.

Ada Oil Company was bound by the Judgment of the Court of Appeals and was not an indispensable party.

Furthermore, this Court has held that the indispensability of parties is determined on practical considerations. *Shaughnessy v. Pedreiro,* 349 U.S. 48, 99 L.Ed. 868, 75 S.Ct. 591; *Williams v. Fanning,* 332 U.S. 490, 92 L.Ed. 95, 68 S.Ct. 188. Applying that test, and under the record before the Court, Petitioner should not now be permitted to ignore the trial pleadings and the findings from the evidence and

to now raise this issue of indispensable parties. Petitioner first contended that Ada Oil Company was a necessary party while Petition for Rehearing was pending in the Court of Appeals. Petitioner should not be permitted by so doing to circumvent the finding made on the evidence that this contract was in fact between the Houston Oilers and Ralph Neely.

The pending action in the 133rd District Court of Harris County, Texas, styled "Ralph Neely, Plaintiff v. Ada Oil Company, Defendant" referred to in the Petition, is an action filed *after* the Court of Appeals for the Tenth Circuit had rendered its decision rejecting the same contentions there and here made by Petitioner pertaining to the service station agreement. The Texas District Judge, on motion of Respondent, has stayed the proceedings in the Texas case pending determination of the instant cause by this Court.

4. Petitioner Cannot Properly Raise For the First Time in His Petition For Writ of Certiorari, an Issue Not Urged in The Courts Below That The Dallas Cowboys Football Team Was An Indispensable Party to This Action.

This is an action brought by Respondent for declaratory judgment as to the validity of a contract between Respondent and Petitioner, and to enjoin a violation by Petitioner of the contract. The Dallas Cowboys Football Club is not a party to the contract, no adjudication is asked as to any of its contractual rights. That Petitioner, Ralph Neely, made a subsequent, separate and distinct contract with the Dallas Football Club does not make it a necessary party to this litigation. This third party could not have been served

with process in the Western District of Oklahoma where this action was instituted.

The Court should give no consideration to the fourth question presented by Petitioner because it was raised for the first time in the Supreme Court, and is not a proper ground for granting review on certiorari under Rule 19 of the Rules of the Supreme Court.

CONCLUSION

The claimed conflict between the decision of the Court of Appeals for the Tenth Circuit and the decision of the Court of Appeals for the Fifth Circuit in *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., supra,* does not exist. The Court of Appeals properly construed and applied the Texas law pertaining to the statute of frauds. Petitioner's contentions pertaining to indispensable parties are unfounded and do not raise issues which are grounds for review by this Court on certiorari. No special or important reasons exist for review on certiorari by this Court. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GUS RINEHART
2320 First National Building
Oklahoma City, Oklahoma

WILLIAM D. DEAKINS, JR.
WILLIAM R. ECKHARDT
2005 First City National Bank Bldg.
Houston, Texas
Attorneys for Respondent

Certificate of Service

I hereby certify that a copy of the foregoing Brief was mailed to Angus G. Wynne, 2808 Southland Center, Dallas, Texas 75201, and to James D. Fellers and J. Howard Edmondson, 2700 First National Building, Oklahoma City, Oklahoma 73102, counsel for Petitioner, on August_____, 1966.

_____

APPENDIX "A"

United States Court of Appeals

TENTH CIRCUIT

NO. 8520 - MARCH TERM - 1966

HOUSTON OILERS, INC., *Appellant,*

vs.

RALPH NEELY, *Appellee.*

Appeal From The United States District Court For The Western District of Oklahoma

---

William R. Eckhardt of the firm of Vinson, Elkins, Weems & Searls, Houston, Texas, and Gus Rinehart of the firm of Rinehart & Morrison, Oklahoma City, Oklahoma, for Appellant.

James D. Fellers of the firm of Fellers, Snider, Baggett & McLane, Oklahoma City, Oklahoma, and Thomas J. Moroney, Jr., of the firm of Wynne, Jaffe & Tinsley, Dallas, Texas, (Angus G. Wynne, Dallas, Texas, and J. Howard Edmondson, Oklahoma City, Oklahoma, with them on the brief) for Appellee.

Before PICKETT, HILL and SETH, Circuit Judges.

PICKETT, Circuit Judge.

Page 2 of Opinion

This appeal concerns the validity of a professional football contract signed by Ralph Neely, a University of Oklahoma football player, and Houston Oilers, Inc., a Texas corporation which owns and operates a professional football team in the American Football League. Neely, a high school athlete of great promise, graduated from the Farmington, New Mexico high school in 1961, and found his way to the University of Oklahoma at Norman, Oklahoma. There his proficiency in football continued to develop, and in his senior year he became one of the nation's outstanding collegiate football players. He intended to play professional football and desired to take full advantage of the financial benefits arising from the rapidly growing popularity of professional football and the rivalry existing between the two major professional football leagues. Upon completion of the regular football schedule at the University of Oklahoma on November 28, 1964, the right to contract for Neely's services was awarded under a draft process to the Houston Oilers in the American Football League and to the Baltimore Colts in the National Football League.[1] On December 1, 1964, Neely signed American Football League Standard Players Contracts with Houston, each containing a "no-cut" clause, for the seasons 1965 through 1968, and received therefor a $25,000 bonus check. Thereafter Neely signed contracts with the Dallas Cowboys of the National

[1] Under the rules of both leagues, a club which selects a player in the regular course of the draft owns the exclusive right to contract for the services of that player.

Football League, which had acquired Baltimore's draft rights to Neely, and returned the Houston contracts and the $25,000 bonus check.

Houston thereupon brought this action for a judgment, declaring its contract with Neely to be valid and enforceable, and for an injunction restraining him from playing professional football with any team other than Houston. The trial court, in denying the relief sought, found that the contract was tainted with fraud and violative of the Texas Statute of Frauds. We hold that the undisputed facts in the record disclose a valid and enforceable contract.

Immediately after the draft on November 28, 1964, both Baltimore and Houston had set in motion their contract machinery to acquire the services of Neely. On that date Neely, while enroute to New York City to accept honors awarded him as an All-American choice and to participate in the Ed Sullivan television show, discussed his plans with representatives of the Baltimore team and was given a firm offer to sign a contract. On the same day, Breen, the personnel director of the Houston team, went to New York for the sole purpose of obtaining a commitment from Neely. Neely was accompanied by his father-in-law, Robert Forte, an Oklahoma City businessman, who participated in all the negotiations as advisor to Neely. In New York City, Neely advised Breen of the Baltimore offer,[2] but indicated that he preferred to play in the southwest. Neely

---

[2] This offer was stated to be a $25,000 bonus and a four-year contract starting at $16,000 per year and escalating to $25,000 for the fourth year.

told Breen that in any contract negotiations he wanted to discuss an arrangement for off-season work. Breen assured Neely and Forte that such an arrangement could be worked out, but only K. S. Adams, Jr., President of the Houston Club, could discuss such proposals. For the purpose of continuing contract discussions, the three traveled to Houston, arriving there on November 30th. At a meeting attended by Neely, Forte, Adams and Martin, the club's General Manager, a four-year contract with a "no-cut" clause was offered to Neely. The offer provided for a $25,000 bonus and a salary of $16,000 per year. In addition, Adams agreed to secure employment for Neely with a local real estate firm at a guaranteed annual income of not less than $5,000. Adams also agreed that an oil company which he owned and controlled would construct a "conventional Phillips 66 Service Station" on a suitable location in Harris County, Texas, at an approximate cost of $30,000 to $60,000, and convey the same to Neely by special warranty deed, subject to the Phillips 66 lease and a deed of trust.

Neely was impressed with the offer but desired further time to consider it. On December 1, 1964, Adams was advised that the offer was accepted. In the meantime, Neely had conferred with his wife and the owner of the Baltimore Club. The Standard Players Contracts were then prepared and executed by the parties,[3] but were left un-

[3] These player contracts are identical to those signed by all A.F.L. players and, in substance, are the same as those used in the N.F.L.

dated. The letter agreement for additional employment, the filling station agreement; and the bonus check were dated December 1, 1964, and executed and delivered on that date. It is stipulated that these instruments constitute a single transaction. From the beginning of the discussions, Neely, for tax reasons, had insisted that the bonus money must be paid in 1964, and further, that the signing of the contract and the acceptance of the bonus money be kept secret to prevent him being declared ineligible to participate in the post-season Gator Bowl game on January 2, 1965, to which the University of Oklahoma had accepted an invitation. Any rational consideration of the evidence leads to the conclusion that all the parties knew that if Neely signed a professional football contract and received money therefor, under the rules of the N.C.A.A. and the Big Eight Conference, of which the University of Oklahoma was a member, he would consequently become ineligible to compete in the post-season game. Neely and Forte were advised that such a large sum of money could not be paid without a signed contract. It was then agreed that when the contract was signed, the $25,000 bonus check would be made payable to Forte as Trustee and that all the contract transactions would remain confidential, with no public announcement until after the Gator Bowl game.

After the contracts were executed, copies were delivered to Neely, he and Forte returned to Oklahoma. Later that day Houston's General Manager inserted the date "December 1, 1964" on the Standard Players Contracts and thereafter copies were filed with the A.F.L. Commissioner.

Neely testified that he understood the arrangement to mean that the contracts would not be effective or filed until after the post-season game. However the contracts provide in plain language that they shall be valid and binding immediately upon execution and that a copy shall be filed with the League Commissioner within ten days thereafter.[4] The A.F.L. rules also require the filing of all player contracts within 10 days after execution.

Immediately upon his return to Oklahoma, Neely was advised that the Dallas Cowboys, another team in the N.F.L., had obtained Baltimore's draft rights and desired contract discussions with him. Forte made several trips on behalf of Neely, and, unknown to Houston, Neely's contracts were forwarded to Dallas' attorneys for examination. Neely signed letters dated December 29, 1964, prepared by attorneys for Dallas, addressed to Houston and Adams, advising that he did not consider himself bound by the contracts and was withdrawing therefrom. The $25,000 bonus check was returned. These letters were received by Houston and Adams on December 31st. On that date the

---

[4] Each of the Players Contracts contain this provision:

"18. Upon its execution, this contract shall be valid and binding immediately upon the parties hereto. A copy of this contract shall be filed by the club with the Commissioner within ten (10) days after execution. Within ten (10) days after its filing in the League office, the Commissioner shall have the right to terminate this contract by his disapproval in accordance with and pursuant to the powers vested in him by the Constitution and the By-Laws of the League. If so terminated, the Commissioner shall promptly give both parties written notice of such termination and thereupon both parties shall be relieved of their respective rights and obligations hereunder."

Dallas Club deposited $25,000 to the account of Neely in a Dallas bank. Prior to any publicity of the matter, Neely, apparently sensing trouble after the return of the Houston contracts, advised his coach in Jacksonville, Florida, where the Oklahoma team was preparing for the Gator Bowl game, of his activities in regard to the Houston contract. At about midnight on December 31st, Neely was notified that there had been some publicity concerning his signing with Houston. On January 1, 1965, Neely was advised that he had been declared ineligible to participate in the Gator Bowl game. There is no evidence from which it can be inferred that any publicity by Houston brought about this action. That evening Neely signed a contract to play with Dallas for the 1965 through 1968 seasons. He played for Dallas during the 1965 season and will continue to do so unless enjoined therefrom.

Neely was over the age of 21 years, and it is stipulated that he had "special, exceptional, unique knowledge, skill and ability as a football player." He was competent to enter into a valid contract to perform these services exclusively for a designated person or organization, and upon agreeing to so limit his services, he was subject under Texas law, which the parties agree is controlling, to be enjoined from performing them for anyone else.[5] Dallas Cowboys

---

[5] The players contracts signed by Neely provide:

"5. The Player promises and agrees that during the term of this contract he will not play football or engage in activities related to football for any other persons, firm, corporation or institution except with prior written consent of the Club and the Commissioner . . ."

Football Club, Inc. v. Harris, Tex., 348 S.W.2d 37; Mission Independent School Dist. v. Diserens, Tex., 188 S.W.2d 568.

Disagreement over the validity of these contracts does not arise out of the provisions contained therein, but from an extrinsic oral understanding that their existence was to be kept secret until after the post-season game. The essence of Neely's contentions before the trial court and here is that the contracts are unenforceable because Houston falsely represented that the effective date of the agreement would be January 2, 1965, and that Houston's filing of the contract copies with the Commissioner was a violation of its promise to keep the matter secret. The trial court was of the opinion that these alleged misrepresentations constituted fraud in the inducement of the contract which would subject it to rescission. As has been heretofore stated, each contract specifically provides otherwise. Neely does not say he was so naive that he did not know his eligibility for further inter-collegiate football competition would be destroyed when he signed a professional football contract and received the bonus money.[6] The record is

[6] Neely testified: "Q. But you did know that if you took money for playing football that that would make you ineligible to play college football, didn't you? A. Took money, yes sir."

In regard to the acceptance of expense money for the trip to Houston, which is also a violation of inter-collegiate rules, he testified: "Q. Isn't it true, Ralph, that you well knew that any time your expenses were paid by a professional football team, that made you ineligible to play football? A. I suspected it, but I didn't know."

too clear for any misunderstanding that the purpose of secrecy surrounding the execution of the contracts was not to preserve Neely's eligibility, but rather to prevent his ineligibility from becoming known; otherwise there was no need for secrecy. This is illustrated by his later dealings with Dallas which similarly were not publicized, although a $25,000 deposit was made to his credit on the 31st day of December, 1964, thereby permitting him to report that amount as income for the year 1964 in his income tax return. The acceptance of this money ended his eligibility.

The trial court's conclusion that Houston represented to Neely that he would remain eligible if the contracts were kept secret is not supported by the record. As has been stated, it is apparent that Neely knew his eligibility was lost the instant he completed the Houston transaction and took the bonus money. Furthermore, the only claimed violation of the secrecy agreement was that Houston filed the contract with the League Commissioner. Nothing issued from the Commissioner's office occasioned the declaration of ineligibility. The scheme to mislead Neely's school, his coaches, his team, and the Gator Bowl opponents, no doubt would have succeeded but for Neely's own double dealing with Dallas, resulting in his attempt to avoid the Houston contracts. While we do not for a moment condone the ruthless methods employed by professional football teams in their contest for the services of college football players,

including the lavish expenditure of money,[7] it must be conceded that there is no legal impediment to contracting for the services of athletes at any time, and the above-mentioned conduct, while regrettable, does not furnish athletes with a legal excuse to avoid their contracts for reasons other than the temptations of a more attractive offer. Although there are many dismal indications to the contrary, athletes, amateur or professional, and those connected with athletics, are bound by their contracts to the same extent as anyone else, and should not be allowed to repudiate them at their pleasure.

Fraud has been defined in Texas as "the successful employment of cunning, deception, or artifice to circumvent, cheat or defraud another to his injury." International Life Ins. Co. v. Herbert, Tex., 334 S.W.2d 525, 530. This court has said that fraud "is never imputed or presumed and the court should not sustain findings of fraud upon circumstances which at the most create only suspicion." Davis v. C.I.R., 184 F.2d 86, 87. The draft system in professional football limited Neely's negotiations intially to Baltimore

---

[7] These methods and their adverse effect upon amateur football players were described by Judge Skelly Wright in Detroit Football Company v. Robinson, 186 F.Supp. 933, 934, where he said:

"This case is but another round in the sordid fight for football players, a fight which begins before these athletes enter college and follows them through their professional careers. It is a fight characterized by deception, double dealing, campus jumping, secret alumni subsidization, semi-professionalism and professionalism. It is a fight which has produced as part of its harvest this current rash of contract jumping suits. It is a fight which so conditions the minds and hearts of these athletes that one day they can agree to play football for a stated amount for one group, only to repudiate that agreement the following day or whenever a better offer comes along."

and Houston. His collegiate football record was such that he and his father-in-law could anticipate that his services would be in demand and would command a premium contract. The opportunity presented to Neely would come but once in his lifetime, and it is understandable that the situation would be exploited to the maximum. It was with this background that Neely negotiated with Houston and Baltimore. Neely, a bright young man,[8] ably advised by his father-in-law, knew exactly what he wanted. With commendable foresight, he sought not only a favorable contract, but also a business arrangement extending beyond his football days. Houston, through its president, undertook to meet this requirement. Neely, after consulting his wife and father-in-law, and after further discussion with Baltimore, accepted Houston's final proposal, which he characterized as a "fine offer." Unexpectedly Dallas arrived on the scene, and Neely found another bidder for his services. He welcomed this new opportunity and apparently plans were set in motion designed to convince him that he could ignore the existing agreements with Houston. The first indication that Houston had of Neely's dissatisfaction with his arrangement was when the contracts were received in the mail on December 31, 1964. Up to that time there had been no publicity, and Neely was in Jacksonville prepared to play in the January 2nd game. Representatives of Houston were there to arrange for the photographing of a simulated contract-signing

---

[8] Neely graduated from the College of Business Administration at the University of Oklahoma with a double major in accounting and finance.

ceremony immediately after the game. It was Neely, not Houston, who disclosd to his coach the facts which brought about a declaration of his ineligibility. Even then Neely had lost his eligibility through his transactions with Dallas. There is insufficient evidence to sustain a finding of material misrepresentation on the part of Houston amounting to fraud which would affect the validity of the contracts. It is true that Neely testified that it was his understanding that the contracts were not to become effective until after the game on January 2nd. The contracts, however, provided otherwise, and we are not at liberty to rewrite them. Furthermore, the letter of employment, the filling station arrangement, and the $25,000 bonus check which was delivered upon the execution of the contracts, were all dated December 1, 1964.

The trial court, in denying the relief sought, apparently applied the equitable maxim that "he who comes into equity must come with clean hands." This doctrine, fundamental in equity jurisprudence, means that equity will not in any manner aid a party whose conduct in relation to the litigation matter has been unlawful, unconscionable, or inequitable. See, Garland v. Brown, Tex., 52 F. Supp. 401. But the doctrine does not exclude all wrongdoers from a court of equity nor should it be applied in every case where the conduct of a party may be considered unconscionable or inequitable. Office Employees Internat'l Union v. Houston Lighting & P. Co., Tex., 314 S.W.2d 315; Kirkland v. Handrick, Tex., 173 S.W.2d 735. The maxim admits

Page 13 of Opinion

of the free exercise of judicial discretion in the furtherance of justice. See, Johnson v. Yellow Cab Co., 321 U.S. 383. While it is not contended here that Houston did not have a legal right to sign Neely to a professional player's contract, it is urged that when Houston participated in a scheme to conceal that fact for the purpose of permitting an ineligible player to participate in a post-season game, it was such deceit upon others that a court of equity should not intervene to assist in the enforcement of the contract. With this argument we cannot agree. It is neither unlawful nor inequitable for college football players to surrender their amateur status and turn professional at any time. Neely was free to bind himself to such a contract on December 1, 1964 as he would have been after January 2, 1965. Nor was Houston under any legal duty to publicize the contract or to keep it secret. Its agreement to keep secret that which it had a legal right to keep secret cannot be considered inequitable or unconscionable as those terms are ordinarily used in contract negotiations. Neely relies on the case of New York Football Giants v. Los Angeles Chargers F. Club, Inc., 5 Cir., 291 F.2d 471, where, in a somewhat similar situation, the court applied the clean hands doctrine. It is quite apparent that the player contract in that case was acquired under circumstances much different from those in this case, but if the rule announced in that case was intended to apply to every instance in which a contract is entered into with a

college football player before a post-season game with an understanding that it be kept secret to permit that player to compete in the game, then we must respectfully disagree with the conclusion.

The trial court held that the service station agreement violated the Texas Statute of Frauds, Art. 3995, Revised Civil Statutes of Texas, as amended; Vernon's Anno. Texas Statutes, Art. 3995, in that it is vague, indefinite, uncertain and unenforceable. The letter agreement specifically provides that the service station will be for the sale and distribution of Phillips '66 products and that Ada Oil Company will arrange for the construction of a "conventional Phillips '66 Service Station of either Series ER 2000, ARS 201 or DRS 201", and be financed according to the plan selected. It is clear from the unqualified language of the instrument that the station site, the type of station, and the financing thereof is to be determined by Ada Oil Company within the limits specified, without the necessity of further agreement. Such writing satisfies the Texas Statute of Frauds. Tiller v. Fields, Tex., 301 S.W.2d 185.

REVERSED and REMANDED with instructions to grant the injunction.

APPENDIX "B"

TEXAS REVISED CIVIL STATUTES

Art. 3995. Writing required.

No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:

1. To charge any executor or administrator upon any promise to answer any debt or damage due from his testator or intestate, out of his own estate; or,

2. To charge any person upon a promise to answer for the debt, default or miscarriage of another; or,

3. To charge any person upon any agreement made upon consideration of marriage; or,

4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or,

5. Upon any agreement which is not to be performed within the space of one year from the making thereof. Acts 1840, p. 28; P.D. 3875; G.L. vol. 2, p. 202.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 6 1966
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 407

RALPH NEELY,

Petitioner,

v.

HOUSTON OILERS, INC.,

Respondent.

RESPONSE TO BRIEF IN OPPOSITION

ANGUS G. WYNNE,
2808 Southland Center,
Dallas, Texas 75201,

JAMES D. FELLERS,
J. HOWARD EDMONDSON,
2700 First National Bldg.,
Oklahoma City,
Oklahoma 73102,

Counsel for Petitioner.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 407

RALPH NEELY,

Petitioner,

v.

HOUSTON OILERS, INC.,

Respondent.

RESPONSE TO BRIEF IN OPPOSITION

I.

Petitioner accepts the statement made by Respondent that the granting of a Writ of Certiorari is not a matter of right but of sound judicial discretion on the part of this Court and likewise Petitioner accepts the quotation by Respondent from *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, because the application which Petitioner has brought before this Honorable Court comes absolutely within the elements of this quotation.

However, Petitioner cannot accept as true the other statements made in the argument by Respondent because Respondent wanders off and studiedly refuses to face the actual

conflict of the instant case and the *New York Football Giants* case. Judge Picket notes, for the Court below, the conflict of opinion with the *New York Football Giants* case saying,

> " * * * it is urged that when Houston participated in a scheme to conceal that fact for the purpose of permitting an ineligible player to participate in a post-season game, it was such deceit upon others that a court of equity should not intervene to assist in the enforcement of the contract. With this argument we cannot agree." (Appendix C-12 of Petition)

and then saying:

> "But if the rule announced in that case was intended to apply to every instance in which a contract is entered into with a college football player before a post-season game with the understanding that it be kept secret to permit that player to compete in the game, then we must respectfully disagree with the conclusion." (Appendix C-13 of Petition)

Respondent argues that there was a finding of fraud in the *New York Football Giants* case, but even a casual reading of the Fifth Circuit opinion will show that the learned Chief Judge Tuttle considered only the "clean hands" doctrine in disposing of the matter. He said,

> "Here the plaintiff's whole difficulty arises because it admittedly took from Flowers what it claims to be a binding contract, but which it agreed with Flowers it would, in effect, represent was not in existence in order to deceive others who had a very material and important interest in the subject matter." (Appendix D-8 of Petition)

The undisputed testimony of all parties in the instant case reflects that it was agreed by the parties to keep the Neely contract secret so that he could play in the bowl game.

This was the same deceitful arrangement condemned by the Fifth Circuit. Why should a different standard of moral conduct be proclaimed in the Tenth Circuit? Such holding has created embarrassment throughout the sports world, disturbed all college athletic associations, and will continue, unless corrected, to create and reflect different standards in moral conduct and equity principles throughout the jurisprudence of our land.

In passing on the doctrine of clean hands, every court or tribunal must question its own equitable standards. What are its standards? Will it permit a plaintiff to come in and ask for an injunction when such plaintiff admits that it agreed to keep a contract secret from the *public* and *all others interested* and to pretend that such contract did not actually exist in order to perpetrate *a fraud upon the universities* and upon all parties interested in *clean* football and *clean* sports throughout the land? The agreement to deceive and the actual attempt at deceit is not denied. *Respondent does not even question the agreement to deceive in its reply.* Can there be a more flagrant violation of the principles of equity?

II.

Petitioner respectfully asks consideration of a discussion of the conflict between the decision below and *New York Football Giants* case because Respondent's brief insists that they are distinguishable on the facts; though the facts upon which the decision are based are identical.

The Respondent discusses a material misrepresentation to Flowers by Mara, owner of the Giants, which Respondent

claims was the basis of the decision. The so-called material misrepresentation is not identified by Respondent but apparently is the agreement of Mara not to submit the contract to the Commissioner. The trial court in the *New York Football Giants* case based its decision on this ground but the Fifth Circuit *expressly* excluded it as a basis of its decision. The Fifth Circuit held that the trial court was wrong to ever reach such a determination and that the "clean hands" doctrine should be applied before reaching any legal determinations. (Appendix D-6 of Petition)

The deceit which required the Fifth Circuit to apply the "clean hands'" doctrine had nothing to do with any misrepresentation between Flowers and Mara. The deception was that practiced by *both* Flowers and Mara. The decision talks of "the deceit agreed to between the parties" (Appendix D-5 of Petition); "the deception proposed by the Giants and entered into by him" (Appendix D-5 of Petition); "in order to deceive others who had a very material and important interest in the subject matter" (Appendix D-8 of Petition); and, "the pretended status which it has foisted on the public" (Appendix D-8 of Petition). Nowhere is the decision concerned with any misrepresentation to Flowers and such alleged fact forms no basis for the decision.

Another fact difference urged by Respondent is that the contract in the instant case did not require approval by the Commissioner. Once again this factual distinction was expressly eliminated from the decision of the Fifth Circuit

by its refusing to consider the legal issues on the merits (Appendix D-6 of Petition) and modifying the decision of the trial court to the extent it had considered such facts. (Appendix D-8 of Petition)

The other distinction between the two conflicting cases urged by Respondent concerns Flowers' playing and Neely's not playing in the games. Flowers' playing or not playing was in no way involved in the decision of the Fifth Circuit. The *deceit* was the agreement to keep the contract secret, the representation that it was not in existence. (Appendix D-8 of Petition) The conduct of the Respondent in the instant case was identical to that of the Giants in the conflicting case. The fact of Neely's playing or not playing could have no importance in the case at bar because it is elementary that it is the conduct of the *plaintiff* which dictates whether or not the "clean hands" doctrine will be applied.

III.

The intercollegiate athletic associations and all other associations and parties connected with our great sports world have endeavored to keep the sports picture clean and above suspicion of fraud, deceit and cheating. It is true that in baseball we had our scandal, but each of the violators was banished from sports and the public eye into obscurity. It is true that one of our great Olympic heroes had to return his medals, but he suffered and was chastised in spirit for the balance of his life. But for the first time one of our great courts has issued a hunting license *to hunt the amateur* so that the professional teams with coffers full of money may prey upon the amateur athletes and hold before them im-

mense salaries which would almost corrupt the most stalwart exponent of integrity.

No other court has ever sustained a contract conceived in deceit and an agreement to hide from the public, the universities and other promotors of integrity in athletics, the conniving plan here fostered. It is true that the Tenth Circuit must have been impelled by some reason to overrule its own decisions about the duty of the appellate court to follow the findings of fact of the trial judge and thus refuse to sustain a single material finding that the learned judge had made while looking at the witnesses. Whatever the reason, here stands an opinion setting aside all of the findings of the trial judge and overruling an opinion of another circuit that will be remembered with regret and chagrin unless it is overturned. The opinion of the Fifth Circuit must survive and the principles of truth and integrity there proclaimed will resound and repeat themselves in the lives of all those who follow us throughout generations yet unborn.

"Oh what a tangled web we weave when first we practice to deceive". Will this become a way of life? Will we reward such chicanery? The answer should be clear.

IV.

In reply to the contention of Respondent that the Statute of Frauds of the State of Texas has not been violated and that Ada Oil Company is not an indispensable party, Petitioner does not care to belabor the questions because they are fairly presented in the application and a reading of the

cases therein cited is a complete answer to Respondent's endeavor to claim that:

(1) Ada Oil Company is bound by the judgment and would be forced to perform thereunder though not a party to the suit; and

(2) this Honorable Court must presume that Ada Oil Company, though not a party, and the Houston Oilers, though pleading guilty to a deceitful arrangement in securing the contract, *must be trusted* by the Court to treat the Petitioner fairly.

If Petitioner is enjoined, who will compel Ada Oil Company to comply with the contract? Who will fill in the blanks in the unknown lease or leases to be executed? These questions answer themselves. We respectfully refer to the manner in which these points are covered in the original application.

WHEREFORE, Petitioner prays that the Writ of Certiorari be granted.

Respectfully submitted,

ANGUS G. WYNNE,

JAMES D. FELLERS,

J. HOWARD EDMONDSON,
Counsel for Petitioner.

August 31, 1966

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 4 1966
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 407

RALPH NEELY,

Petitioner,

v.

HOUSTON OILERS, INC.,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

ANGUS G. WYNNE,
2808 Southland Center,
Dallas, Texas 75201,
Counsel for Petitioner.

WARLICK PRESS, INC.—2203 VALDINA STREET—DALLAS—ME 1-3130

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 407

RALPH NEELY,

Petitioner,

v.

HOUSTON OILERS, INC.,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

Ralph Neely prays that this Court grant rehearing of its order of October 10, 1966, denying the Petition For A Writ of Certiorari and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in the above-entitled case as prayed for in the Petition.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. A substantial ground for granting certiorari in this case not previously presented to this Court, is that the animosity and ill-will of the Court of Appeals for the Trial

Judge, Stephen S. Chandler, deprived the Petitioner of a fair review of his case in the Court of Appeals. Attorneys for Petitioner originally chose not to raise this ground because they felt that their Petition For A Writ of Certiorari presented sufficient grounds, without the necessity of exploring such an unpleasant subject. However, subsequent to the filing of the Petition, Judge Chandler himself raised the point, by inquiring of Petitioner's attorneys in open court whether such ground has been raised and asserted in the Petition. Judge Chandler called the attorneys' attention to the fact that the opinion of the Court of Appeals had, in effect, referred to him as "irrational." In this connection, Petitioner will also demonstrate that the Tenth Circuit's "irrational" comment applies equally as well to the Supreme Court of Texas.

This Honorable Court is well aware of the conflict and hostility between Judge Chandler and the Court of Appeals. It has been presented to this Court in pending Case No. 1111, Misc., *Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, Petitioner v. Judicial Counsel of the Tenth Circuit of the United States, Respondent.* However, it is wholly unnecessary to go outside the record of this very case to find such hostility adequately demonstrated.

That the animosity and hostility of the Court of Appeals toward Judge Chandler affected their opinion is demonstrated by the Court's opinion in passing upon (a) Respondent's fraudulent inducement of the contract, (b) the Texas

Statute of Frauds, and (c) the doctrine of unclean hands; each of which will be discussed separately below.

a. *Respondent's Fraudulent Inducement of the Contract.* Relying upon Petitioner's testimony that Respondent's president promised him that the football contracts would remain undated, that they would be kept secret, and that they would therefore not become effective until after January 2, 1965, Judge Chandler found as a fact that Petitioner "relied on the representations of Adams as to his eligibility if the agreement was kept secret and the agreement of Adams and Martin to keep it secret. He was thereby induced to execute the instruments." (Appendix B-6 of Petition) In overruling this finding of fact, which was supported by testimony in the record, the Tenth Circuit opinion noted that "the contracts provide in plain language that they shall be valid and binding immediately upon execution and that a copy shall be filed with the League Commissioner within ten days thereafter." The opinion then asserts that "*any rational consideration* of the evidence leads to the conclusion that all the parties knew that if Neely signed a professional football contract and received money therefor * * * he would consequently become ineligible to compete in the post-season game."

Further, the necessary effect and implication of the Tenth Circuit's comment quoted above, is that no "rational consideration of evidence" can lead to the conclusion that a party can believe, and rely upon, representations which are contradicted by the plain language of the contract he executes. In other words, the Tenth Circuit has stated that

it was irrational to conclude that Petitioner could believe, and rely upon, a representation that the contract would not be effective (protecting his eligibility) because the plain language of the contract contradicts such representation. If those Judges really believe this proposition, then they must also feel that the Supreme Court of Texas is "irrational", because that distinguished court held in 1957 that a party could indeed believe, and rely upon, fraudulent representations which were absolutely contradicted by the language of the contract. In *Dallas Farm Machinery Company v. Reaves*, 307 S.W. 2d 233, the Texas Supreme Court held that a party could predicate a claim of fraud upon representations which were contradicted in the contract, noting that if a contract is voidable on account of fraud in its inception, then each and every portion and clause thereof is unenforcible, including the clause alleged to contradict the representation. In arriving at this result, the Supreme Court reviewed a long line of conflicting decisions on the subject, and adopted the foregoing rule as the law of Texas only after lengthy deliberation. In doing so, the Court quoted with approval from, and adopted the rule announced in, *Texas & N.O. Ry. Co. v. Thompson*, 12 S.W. 2d 963 (Comm. App. 1929), where a party was allowed to set aside a release on the grounds of a fraudulent promise of employment made to induce him to sign the contract, *despite a specific recitation in the release that no promise of employment had been made.*

It was stipulated by the parties in this case that the law of Texas governed the entire transaction, and the Tenth

Circuit's opinion acknowledged this fact. Yet, the opinion completely disregarded a conclusion by the Trial Judge which was in accord with a Supreme Court of Texas ruling, and supported by the evidence, with the gratuitous comment that "no rational consideration of the evidence" could lead to such a conclusion. The point is made even stronger when the Tenth Circuit's opinion is examined in light of its earlier pronouncements, under Rule 52 of the Federal Rules of Civil Procedure, against overturning the Trial Court's findings of fact. For example, the opinion in question, written by Judge Pickett, is a rather abrupt departure from the rule announced by the same Judge in *Lindsey v. Oregon-Washington Plywood Co.*, 286 F. 2d 710 at 711 (10 Cir. 1961);

> "Findings of fact are presumptively correct, and will not be set aside on appeal unless clearly erroneous. Fed. R. Civ. P. 52(a), 28 U.S.C.A.; Walker v. Wiar, 10 Cir. 276 F. 2d 39. On appeal, the evidence is to be viewed in the light most favorable to the prevailing party, and the trial court's findings on factual issues are binding upon appellate courts unless clearly erroneous. Milton v. Granite State Fire Ins. Co., 10 Cir. 196 F. 2d 988."

Petitioner did not choose his forum and sincerely regrets that he has become involved in this controversy. Nevertheless, when an Appellate Court believes a Trial Judge to be irrational, and goes out of its way to call him irrational in their opinion in Petitioner's case, Petitioner has cause to believe that the Appellate Court's hostility toward the Trial Judge played a part in their rendering such opinion. Petitioner must protest this denial of elementary principles of justice and due process.

b. *The Texas Statute of Frauds.* While purporting to recognize and follow applicable Texas law, the Tenth Circuit's opinion completely ignored and disregarded long followed precedents and decisions of the Texas Supreme Court, while allowing an obscure and clearly inapplicable intermediate court decision, *Tiller v. Fields*, 301 S.W. 2d 185 (Tex. Civ. App. 1957, NWH), to govern its holding. Even the author of the *Tiller* case, Justice Fanning, conceded the decision to be an extraordinary graft on the statute of frauds, founded on public policy, and based on the peculiar nature of *oil lease unitization agreements*, which must, "of necessity, be in general terms." In applying the peculiar rule of the *Tiller* case to the contract in this case, the Tenth Circuit had to absolutely disregard, and create direct conflicts with, *Stekoll Petroleum Co. v. Hamilton*, 255 S.W. 2d 187 (Texas Supreme Court 1953); *Taber v. Pettus Oil and Ref. Co.*, 166 S.W. 2d 959 (Comm. of App. 1942, opinion adopted by the Supreme Court); *Fagg v. Texas Co.*, 57 S.W. 2d 87 (Comm. of App. 1933, decision adopted by the Supreme Court); and *Cantrell v. Garrard*, 240 S.W. 533 (Comm. of App. 1922, opinion adopted by Supreme Court). These cases are more fully discussed in the Petition, pages 16-17.

c. *The Doctrine of Unclean Hands.* In reversing Judge Chandler's ruling, this Tenth Circuit panel had to disregard not only rulings of the Texas Supreme Court, but also an identical case by the Fifth Circuit Court of Appeals, i.e., *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F. 2d-471 (1961). This Fifth Circuit case *cannot* be distinguished from the case at bar. (Response to Brief in Opposition, pages 3-5)

Petitioner respectfully submits to this Honorable Court that the unseemly conflict between the Tenth Circuit and Judge Chandler, especially when it affects innocent litigants, can have no other effect than to weaken the entire foundation of our judicial system. If enmity and personal feelings creep into judicial decisions and rulings, our citizens are bound to lose their faith and confidence in our administration of justice. Only this Honorable Court, by granting the certiorari requested and affording Petitioner an impartial review, can forestall this erosion of confidence in the Federal judicial system.

2. Since the Petition was denied by this Honorable Court, an entirely new lawsuit has been filed in a Texas court which forcibly proves the soundness of Petitioner's assertion that parties indispensable to a full and final adjudication of this controversy were never before the court. Of even greater importance, however, is the fact that such new lawsuit threatens to *entirely deprive Petitioner of his livelihood!*

In his Petition, Petitioner asserted that Dallas Cowboys Football Club, Inc. ("Dallas") was an indispensable party to this case, inasmuch as Respondent sought to enjoin Petitioner from performing services for Dallas under a written contract for such services; the necessary effect of such injunction, if entered, being to deprive Dallas of Petitioner's services and thereby effectively invalidate the Dallas contract. Petitioner asserted to this Court that no final adjudication could be made of this controversy in the absence of Dallas.

The danger to Petitioner's career and livelihood, by the omission of Dallas from this case was emphatically brought home when, on October 31, 1966, Dallas filed a suit in the State District Court in Dallas, Texas, against Petitioner, Respondent and Ada Oil Company for a declaratory judgment that Dallas' contract with Petitioner is valid, and praying for an injunction to prevent Petitioner from performing services for the Respondent under the contract which the Tenth Circuit has held valid and binding upon Petitioner.

Petitioner is now faced with the distinct possibility that he will be absolutely barred from pursuing his profession, and all because a Federal court has ignored the lack of an indispensable party and has erroneously decided this case *contrary to Texas law.* In other words, Petitioner has little confidence in his ability to defeat Dallas' claim, because Dallas is pursuing its remedy in a Texas court, which will not disregard decisions of the Texas Supreme Court. Yet, because the Tenth Circuit has refused to follow such authorities, Petitioner may very well be enjoined from his profession by conflicting rulings between State and Federal courts; both of them purporting to follow one law.

Such an anomalous situation, and Petitioner's dilemma, would be farcical if the consequences were not so severe. However, Petitioner can find little humor in a situation which effectively impairs his ability to earn a living for his family. Furthermore, even if Petitioner's personal quandry does not warrant this Court's resolution of the impending conflict, Petitioner submits that any such result will have an intolerable effect upon our jurisprudence. This Honorable Court

is already on record about the relationship of Federal decisions, in diversity cases, to applicable State law, and no such conflict as is presented by the situation before this Court should be countenanced.

3. At the time of filing the Petition for a Writ of Certiorari in this case a merger between the two principal professional football leagues had been approved by the two leagues. The leagues had been assured that the violations of federal anti-trust law accompanying the merger would be eliminated by special legislation of the United States Congress. Had that special legislation been passed the necessity of your hearing the case at bar and thereby settling the conflict between this case and the *Giants* case of the Fifth Circuit would not have been so imminent. If the provision of the merger which provides for a common draft of players of the teams had been excluded from anti-trust violation, the competition in signing players and the law suits resulting therefrom, such as that at bar, would have been substantially reduced.

The legislation passed concerning the merger does not exempt from anti-trust violation the common draft. The sole effect of the legislation is to permit the combination of the two leagues into a single league. It was the intent of both the House and Senate that the combined league have no greater anti-trust immunity than the existing leagues enjoyed. *Statement of the Managers on the Part of the House, on Amendments to H.R. 17607.* Because the common draft was not exempted by legislation the merger has not necessarily affected the situation posed by the conflicting cases. If the common draft is not accomplished cases in the nature

of the conflicting cases will occur with increasing frequency and the existence of the two conflicting decisions will be intolerable.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectively urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

ANGUS G. WYNNE,
Counsel for Petitioner.

November 4, 1966

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....
Angus G. Wynne